Supreme Court, U. S.
FILED
OCT 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM,
1978

No. 78-677

ARTHUR YOUNG & COMPANY, *Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent.*

PETITION OF ARTHUR YOUNG & COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARL D. LIGGIO
JOHN E. MATSON

ARTHUR YOUNG & COMPANY
277 Park Avenue
New York, New York 10017
212-922-2465

MILTON V. FREEMAN
STEPHEN M. SACKS

ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036
202-872-6681

Attorneys for Petitioner
Arthur Young & Company

October 20, 1978

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
JURISDICTIONAL STATEMENT	2
QUESTIONS PRESENTED FOR REVIEW	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
The Procedural Background of the Case	4
The Court of Appeals' Decision In Issue	7
REASONS WHY THE WRIT SHOULD BE GRANTED	9
I. THE COURT OF APPEALS IMPROPERLY PERMITTED THE SEC STAFF TO CONDUCT AN ADMITTED FISHING EXPEDITION THROUGH ARTHUR YOUNG'S FILES	10
II. THE COURT OF APPEALS IMPROPERLY PERMITTED THE COMMISSION TO ABDICATE ITS STATUTORY RESPONSIBILITIES WITH RESPECT TO AN INVESTIGATION BY ITS STAFF	14
III. THE COURT OF APPEALS IMPROPERLY RENDERED JUDICIAL REVIEW OF AGENCY COMPULSORY PROCESS MEANINGLESS	18
IV. THE COURT OF APPEALS' DECISION SQUARELY CONFLICTS WITH A SEVENTH CIRCUIT DECISION CONSIDERING THE SAME ISSUES	21
CONCLUSION	25

APPENDICES

Page

Appendix A

Opinion Of The United States Court Of Appeals For The District Of Columbia **1a**

Modification Of Opinion Of The United States Court Of Appeals For The District Of Columbia **34a**

Appendix B

Text Of Securities And Exchange Commission Private Order Of Investigation "In The Matter Of SCA Services, Inc." File No. HO-867 ..... **1b**

Appendix C

Attachment To Subpoena Duces Tecum Served On Arthur Young & Company By The Securities And Exchange Commission April 26, 1976 ..... **1c**

TABLE OF AUTHORITIES

Page

Cases:

Air Line Pilots Ass'n v. CAB, 475 F.2d 900 (D.C. Cir. 1973) 19

American Smelting & Refining Co. v. FPC, 494 F.2d 925 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974) 19

CAB v. Delta Air Lines, Inc., 367 U.S. 316 (1961) 15

CAB v. Hermann, 353 U.S. 322 (1957) 20

CAB v. United Airlines, Inc., 542 F.2d 394 (7th Cir. 1976) 21, 22, 23, 24, 24 n.19

Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943) 20

Fisher v. United States, 425 U.S. 391 (1976) 20

FTC v. American Tobacco Co., 264 U.S. 298 (1924) 13, 14

FTC v. Crowther, 430 F.2d 510 (D.C. Cir. 1970) 19

FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir.), *cert. denied*, 431 U.S. 974, *reh. denied*, 434 U.S. 883 (1977) 18

Hawaiian Tel. Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974) 19

Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483 (U.S. May 23, 1978) 12, 13

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) 11, 12, 13

Pub. Serv. Comm. v. FPC, 436 F.2d 904 (D.C. Cir. 1970) 19

Relco, Inc. v. Consumer Product Safety Comm., 391 F. Supp. 841 (S.D. Tex. 1975) 15 n.16

SEC v. SCA Services, Inc., 77 Civ. 1374 (D.D.C.) 3 n.5

Stanford v. Texas, 379 U.S. 476, *reh. denied*, 380 U.S. 926 (1965) 13

United States v. Armour, 376 F. Supp. 318 (D. Conn. 1974) 11 n.14

United States v. Bisceglia, 420 U.S. 141 (1975) 11, 20, 21

	Page
United States v. Dauphin Deposit Trust Co., 385 F.2d 129 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968)	13
United States v. Humble Oil & Refining Co., 518 F.2d 747 (5th Cir. 1975)	11 n.14
United States v. LaSalle Nat'l Bank, 57 L. Ed. 2d 221 (1978)	20
United States v. Morton Salt Co., 338 U.S. 632 (1950)	11, 12, 13, 14
United States v. Powell, 379 U.S. 48 (1964)	20, 21
United States v. Theodore, 479 F.2d 749 (4th Cir. 1973)	13
Statutes and Regulations:	
15 U.S.C. § 77s(b)	3, 3 n. 4, 14, 15
15 U.S.C. § 78u(b)	3 n. 4, 14, 15
28 U.S.C. § 1254(1)	2
49 U.S.C. § 1377(e)	24
17 C.F.R. § 200.66	12
17 C.F.R. § 203.7(a)	19
Other Authorities:	
W. DOUGLAS, GO EAST, YOUNG MAN (1974)	16
Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863 (1962)	2 n.1
3 L. LOSS, SECURITIES REGULATION (2d ed. 1961)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. ____

ARTHUR YOUNG & COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION OF ARTHUR YOUNG & COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This petition involves the decision of the Court of Appeals to allow agency staff personnel virtually unchecked power without any effective review by the agency or the courts to conduct an *admitted* fishing expedition and compel a private citizen to produce every piece of paper in his files.

Although both the District Court and Court of Appeals were concerned by the scope and burden of the staff's "undeniably broad" subpoena and sought to limit the burden imposed by the staff's subpoena, both courts failed to recognize that the Constitution and statutes require more than cosmetic or financial limitations imposed on a staff's broad subpoena. As we will show while it is proper for the Commission staff to seek access to documents relevant to the specified subjects of its investigation, it is wholly improper, at odds with the decisions of this Court, and squarely in conflict with a recent Seventh Circuit decision for the District of Columbia Circuit to compel compliance with a subpoena in which neither the agency nor

the court specified standards or otherwise reviewed or controlled the untrammeled discretion of the agency staff. As Judge Friendly has put it, while delegation to administrative agency staffs is "inevitable; definition of standards is required if the agency members are to be the masters of the staff rather than the slaves of anonymous Neros, each fiddling his own tune."[1] Here, both the agency itself and the Court of Appeals have permitted the "anonymous Neros" to rule, unchecked by either administrative or judicial review.

If the Fourth Amendment and the system of judicial enforcement of administrative subpoenas is to have any meaning, we believe that the instant decision must be reviewed and reversed by this Court.

Opinion Below

The instant petition concerns an opinion and judgment entered by the United States Court of Appeals for the District of Columbia Circuit. That opinion is not yet officially reported.[2]

Jurisdictional Statement

The opinion and judgment of the Court of Appeals were entered on July 24, 1978.[3] Jurisdiction to review the judgment by writ of *certiorari* is conferred on this Court by 28 U.S.C. § 1254(1).

---

[1] Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 882 (1962).

[2] The text of the opinion is set forth in the appendix herein. All citations in this petition to the Court of Appeals' opinion are to the Appendix ("A. —"). The District Court's Opinion is reported at [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,655 (D.D.C. July 13, 1976).

[3] On August 3, 1978, the Securities and Exchange Commission filed with the Court of Appeals a "Suggestion of the Securities and Exchange Commission for Modification of Opinion of July 24, 1978." On September 14, 1978, the Court of Appeals modified its opinion in certain respects not relevant here. These modifications are reflected in the decision as reproduced here at A. 34a-35a.

Questions Presented for Review

1. Whether an administrative agency must reasonably set forth the specific matters under investigation or otherwise control the discretion of its staff before compulsory process served by the agency staff may appropriately be enforced by a court?

2. Whether an administrative agency must establish that a subpoena *duces tecum* reaching all of the documents in the possession of a private citizen is reasonably relevant to matters actually under investigation before it may be enforced by a court?

Statutes Involved

Section 19(b), Securities Act of 1933:

> For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to...subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry.

15 U.S.C. § 77s(b).[4]

Statement of the Case

This case arises from an SEC private investigation of SCA Services, Inc. ("SCA"), a company providing waste disposal services in the United States.[5] As SCA's principal independent

---

[4] Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(b), also in issue in this appeal, is virtually identical to § 19(b).

[5] The investigation resulted in filing an action against SCA and certain former SCA officers and directors. *SEC v. SCA Services, Inc., Christopher P. Recklitis, Berton Steir, Carlton House Corp., Nicholas V. Liakas, Anthony Bentrovato a/k/a Anthony Bentro, Lad Landfill, Inc., Stanton L. Kurzman*, 77 Civ. 1374 (D.D.C.)

auditor, Arthur Young & Company ("Arthur Young") conducted an audit and rendered an opinion on SCA's financial statements for SCA's 1973 and 1974 fiscal years. In conducting its audits, Arthur Young reviewed pertinent SCA documents and financial records in the various locations where SCA transacted business and prepared workpapers and other documents reflecting the audit work performed. These workpapers and documents, contained in over 2,000 work binders and files totalling at least 275 linear feet, were maintained by Arthur Young in its offices in more than 15 different cities in the United States.

On September 25, 1975, Arthur Young received an informal request from the Commission staff for five specific categories of documents pertaining to SCA. By letter dated October 4, 1975, Arthur Young agreed to produce the requested information. Its personnel reviewed between 300 and 400 files, identified documents responsive to the staff's requests, and then promptly produced the documents at a cost to Arthur Young of more than $15,000.[6] Subsequently a subpoena was served and the matters in dispute in this case arose.

The Procedural Background of the Case

On October 2, 1975, the SEC issued an "Order Directing Examination and Private Investigation and Designating Officers to Take Testimony" pertaining to SCA (the "Order of Private Investigation").[7] This Order, which commenced the

[6] Arthur Young's cooperation with the investigation of SCA continued after these documents were produced. In April 1976, a Commission staff accountant requested that Arthur Young produce documents relating to three specific transactions involving SCA. By letter dated May 14, 1976, Arthur Young produced from its files 227 different documents which were responsive to the staff's specific request.

[7] The text of the Order of Private Investigation has been reproduced in the Appendix. A. 1b-3b.

Commission's formal investigation of SCA, empowered certain named Commission staff employees to "subpoena witnesses, compel their attendance, take evidence, [and] require production of any books, papers, correspondence, memoranda, or other records deemed relevant or material to the inquiry...." According to the Order of Private Investigation, the staff was empowered to investigate whether:

> [t]he aforementioned registration statements [of SCA] ...include untrue statements of material facts or omit to state material facts...concerning among other things:
>
> 1. Interest of management and others in certain transactions
>
> 2. Financial statements
>
> 3. Description of business and property
>
> 4. Acquisition or disposition of assets.

On April 26, 1976, the Commission staff served the subpoena *duces tecum* in issue on Arthur Young.[8] This subpoena is "undeniably broad." A. 4a. As a Commission attorney advised the District Court, the subpoena was intended to reach *every document in Arthur Young's files* pertaining to SCA and at least 29 other designated entities and persons:

> What we are basically looking for are their audit and tax workpapers and every document relied upon in preparing the audit and tax reports. [9]

The subpoena expressly sought 14 different types of documents (*e.g.*, memoranda, letters) generated or maintained by Arthur Young over a six-year period with respect to its audits of

[8] The text of the documentary request in the subpoena is set forth in the Appendix. A. 1c-3c.

[9] Transcript of Oral Argument before District Court, June 29, 1976, pp. 16-17.

SCA.[10] But, it did not stop there. Each of the 14 requests were then repeated for any similar documents in Arthur Young's files pertaining to 29 additional individuals, corporations, and trusts. Then, the 14 requests were repeated once again for any similar documents pertaining to "[a]ll officers, directors and employees (present and past)" of SCA.[11] Finally, on top of all this, the 14 requests were repeated for "all documents" relating to "any special engagements, projects or management consulting services" performed by Arthur Young for SCA.

Arthur Young objected to the sweeping nature of the subpoena, refused to comply, and resisted an enforcement

---

[10] Item 1 of the subpoena reads in part as follows:

All documents including but not limited to:

(1) audit programs;

(2) internal control evaluation;

(3) schedules prepared by personnel of Arthur Young ...and/or SCA...subsidiaries or affiliates;

(4) documents received by Arthur Young & Company in the course of the audit;

(5) memoranda relative to the audit, audit conclusions, technical matters, policy, accounting theory, or auditing problems;

(6) review notes or point sheets;

(7) interoffice correspondence and/or memoranda...;

(8) permanent files;

(9) correspondence to and from SCA...its officers, directors, shareholders, employees or other persons related directly or indirectly with SCA...;

(10) separate financial statements...of SCA..., subsidiaries and affiliates;

(11) engagement letters;

(12) all billings and time records;

(13) papers...used in the preparation of tax returns...; and

(14) other documents in...[Arthur Young's] possession or under [its] control relating to the examination of the financial statements of SCA....

[11] The Form 10-K filed by SCA with the SEC for its 1975 fiscal year shows that SCA then had approximately 6,900 employees.

action by the Commission in the United States District Court for the District of Columbia. On July 13, 1976 that Court entered a Memorandum Order enforcing the subpoena subject to certain limitations. Arthur Young then appealed.

The Court of Appeals' Decision In Issue

On July 24, 1978, the Court of Appeals (per Bazelon, Leventhal, and Robinson, JJ.) entered an opinion affirming the order of the District Court, subject to certain modifications. A. 1a-33a. After setting forth the facts, the Court of Appeals recognized that the pertinent provisions of the securities laws specified that compulsory process could be issued by the Commission staff only with respect to " 'the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry.' " A. 7a. Nevertheless, the Court of Appeals held that the Order of Private Investigation by which the Commission authorized its staff to use compulsory process with respect to an investigation of, *inter alia,* SCA's "financial statements" was not an abdication by the Commission of its statutory responsibility to set reasonable parameters for investigations.

According to the Court of Appeals, the Commission had decided to conduct a broad investigation of SCA on the basis of "a preliminary indication of falsifications or misleading omissions in...periodic reports filed with the Commission..." by SCA. A. 10a. Thus, reasoned the Court of Appeals, it was not "unreasonable" for the Commission to authorize its staff to investigate and use compulsory process with respect to SCA's "financial statements" even though this reached virtually every scrap of paper in Arthur Young's possession pertaining to SCA. *Id.* The Court of Appeals concluded that any other result "would stagnate the Commission and frustrate its statutory mission." A. 15a. The Court stated that:

> We are unable to shed the belief that in conferring upon the Commission power to investigate extensively and

> to subpoena documents to that end, Congress anticipated that the Commission's members would function more nearly at the level of policy determination, and might permissibly assign the planning and execution of particular projects to the staff.

A. 16a.

The Court expressed no concern with the broad nature of the investigation because, "so long as the courts retain their power of individual inquiry prior to enforcement of administrative subpoenas, there is relatively little for anyone to fear." A. 18a. The Court held that it was proper for the District Court to have enforced an SEC staff subpoena to Arthur Young for all of its documents generated over a six-year period with respect to its audits of SCA and the many other designated individuals and entities because of the "ambitious" nature of the Commission's investigation. A. 20a. Put another way, the Court held that, "because the investigation is broad, the subpoena's production effort is broad...[t]hat, we think, is enough." A. 20a-21a.

According to the Court of Appeals, the only appropriate standard for a court to consider in determining whether documentary demands in a subpoena were relevant is whether the disclosure sought in the subpoena was unreasonable. A. 24a. As the Court put it, within this general limitation of "reasonableness," an administrative agency staff was licensed to engage in a "fishing expedition" through a private party's files looking for possible violations of law so long as it was acting within the broad subject matter parameters established by the Commission for the investigation. A. 22a-24a. Thus, the Court of Appeals held that all of Arthur Young's workpapers and other materials pertaining to SCA or the others named in the subpoena could be relevant to the broad investigation and therefore had to be produced by Arthur Young.[12]

---

[12] In the final portion of its opinion, not in issue in this petition, the Court of Appeals held that, where the burden of compliance imposed by a subpoena was unreasonable, a court "may appropriately insist upon a reasonable measure of reimbursement" to the party receiving the subpoena. A. 29a. Thus, the Court held that Arthur Young should be afforded "the opportunity to show that the actual expense of compliance with the Commission's subpoena has at any given time become unreasonable and to seek reimbursement accordingly." A. 35a.

Reasons Why the Writ Should be Granted

We respectfully submit that review of the Court of Appeals' decision is necessary to return the federal courts to their proper role in protecting private citizens from the ever-increasing intrusion of the federal bureaucracy into private affairs. Over the past several decades, administrative agencies have proliferated and the scope of their activities has increased dramatically. Virtually every administrative agency, whether old or new, has the authority to conduct investigations and to secure information from private citizens with compulsory process. In almost every instance, however, enforcement of this compulsory process is left with the courts. Thus, the role of the courts in protecting private citizens from overly broad government demands for information is critical. Yet this responsibility was totally abdicated by the court below.

It is particularly important for the Court to stop this pattern of abdication of responsibility by the District of Columbia Circuit because that court considers a significant majority of the agency subpoena enforcement cases brought in the federal courts. It is essential for this Court to make clear that administrative agencies must abide by the statutory limitations on their powers and set bounds on the delegation of authority to their staffs to use compulsory process by confining such delegation to reasonably discrete topics specified as actually under investigation. Further the courts thereafter must set bounds on administrative subpoenas by enforcing only those agency demands that are shown to be reasonably relevant to the specified matters.

I. The Court of Appeals Improperly Permitted the SEC Staff to Conduct an Admitted Fishing Expedition Through Arthur Young's Files.

There is no dispute that the instant subpoena compelled Arthur Young to produce every piece of paper in its files with respect to SCA and the other designated individuals and entities. As the Commission frankly admitted, it was demanding this enormous number of documents from Arthur Young because it was "fishing" in Arthur Young's files for possible violations of law with respect to SCA.[13] Nevertheless, the Court of Appeals held that a subpoena may be enforced if the request is "reasonable" and on its face within the very broad subject matter of the investigation as specified by the Commission. A. 24a. According to the Court of Appeals, a court's inquiry as to the relevance of documents sought in a subpoena may be perfunctory because if "the investigation is broad the subpoena's production effort is broad...[t]hat we think, is enough." A. 20a-21a. Indeed, although the Court of Appeals implicitly recognized that the subpoena was no more than an administrative agency "fishing expedition" through all of Arthur Young's files looking for possible violations of law with respect to SCA, it was unconcerned because an objection so based "retains scarcely any of its clout today." A. 22a.

This cavalier approach to the rights of Arthur Young is, we submit, improper and at odds with this Court's recognition of the appropriate limitations on agency compulsory process. Contrary to the view of the District of Columbia Circuit, while an administrative agency may *appropriately* subpoena documents reasonably deemed to be relevant to a matter actually under inquiry, it may *not* simply rummage through a party's files looking for possible violations of law. The Court of Appeals' decision effectively disregards the long-standing requirement imposed by this Court that "once a...[subpoena] is challenged it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate in-

[13] Commission's Brief to the Court of Appeals, p. 28 *et seq.*

vestigative purpose...." *United States v. Bisceglia,* 420 U.S. 141, 146 (1975). Indeed, the law is clear that the Government may not use compulsory process "to conduct 'fishing expeditions' into...private affairs." *Id.* at 150.[14]

The Court of Appeals read this Court's opinions in *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946), and *United States v. Morton Salt Co.,* 338 U.S. 632 (1950), as effectively dispensing with the relevance requirement and as sanctioning fishing expeditions by administrative agencies. Citing language in those opinions which hold that agencies need not establish probable cause to conduct investigations and that they have a power of inquiry which is "'analogous to the Grand Jury,'" the Court of Appeals held that it was not inappropriate for an administrative agency such as the SEC to examine all of a private party's files in search of possible violations of law. A. 23a.

We believe that the Court of Appeals totally misread *Walling, Morton Salt,* and subsequent decisions of this Court relating to administrative subpoenas. In *Morton Salt,* the FTC sought only compilations of a single report detailing compliance with an earlier court decree. Similarly, in *Walling,* the Wage and Hour Administration sought production of only "specified [employment] records" from the company under investigation. 327 U.S. at 195. In neither case did this Court sanction "fishing expeditions;" rather it made very clear that administrative subpoenas would be enforced only if the request for documents was "adequate, but not excessive, for the purposes of the *relevant inquiry.*" *Walling, supra* 327 U.S. at 209 (emphasis

[14] The Courts have recognized that an administrative agency empowered to require the production of documents must do so only in connection with actual subjects under investigation and cannot use compulsion where the agency is engaged in general research or exploration for potential violations of the law. *United States v. Bisceglia, supra,* 420 U.S. at 152 (Blackmun, J., concurring); *United States v. Humble Oil & Ref. Co.,* 518 F.2d 747 (5th Cir. 1975); *United States v. Armour,* 376 F. Supp. 318 (D. Conn. 1974).

added). Indeed, in *Walling*, this Court was very careful to point out the important Fourth Amendment values to be protected by the courts in reviewing administrative subpoenas:

> [T]he interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason.

327 U.S. at 213.

The SEC's own rules relating to investigations make this pointedly clear:

> The power to investigate carries with it the power to defame and destroy. In determining to exercise their investigatory power, members should concern themselves only with the facts known to them and the reasonable inferences from those facts.... The requirements of the particular case alone should induce the exercise of the investigatory power, and no public pronouncement of the pendency of such an investigation should be made in the absence of reasonable evidence that the law had been violated and that the public welfare demands it.

17 C.F.R. § 200.66.

The instant case shows just how far administrative agencies have come since *Morton Salt* and *Walling*. Now, agency staffs ignore the specificity requirement of those cases and serve blunderbuss subpoenas demanding production of every piece of paper in a private party's files. This practice resembles nothing more than the issuance of general administrative warrants — a practice recognized in *Walling* as "odious in both English and American history." 327 U.S. at 207; *accord Marshall v. Barlow's, Inc.*, 46 U.S.L.W. 4483 (U.S. May 23, 1978); *Stanford v. Texas*, 379 U.S. 476, *reh. denied*, 380 U.S. 926 (1965).

Neither *Walling*, *Morton Salt*, nor any other Supreme Court case sanctions or should sanction this kind of agency intrusion into a private party's papers. As one lower court has stated, the authority to investigate does not give an administrative agency the "unrestricted license to rummage through office files of an accountant in hope of perchance discovering information..." that may involve a violation of law. *United States v. Theodore*, 479 F.2d 749, 750 (4th Cir. 1973). As another court held: "The Government is not entitled to go on a fishing expedition through...[someone's] records. It must identify with some precision the documents it wishes to inspect." *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

The importance of protecting private citizens from government fishing expeditions is not simply a matter of academic concern. A court faced with a request to enforce an administrative agency subpoena must consider the relevance of the information demanded to matters appropriately under investigation to ensure that Fourth Amendment rights are protected and that there is no involuntary disclosure of information absent a clear governmental purpose for its production. As Mr. Justice Holmes put it:

> Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire... and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.... The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. *It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up.*

FTC v. American Tobacco Co., 264 U.S. 298, 305-06 (1924)(emphasis added)(citations omitted).[15]

Thus, we believe it wholly improper and inconsistent with fundamental due process and Arthur Young's right to privacy for a court to enforce an administrative subpoena simply because the agency has said it is conducting a broad investigation and needs everything in a private party's possession to see if any possible violations of law exist. If the Fourth Amendment is to have any vitality in protecting the public from abuses by administrative agencies of their subpoena powers, fishing expeditions through a private party's files searching for possible violations of law should be condemned. We believe that the Court must make this clear to the District of Columbia Circuit specifically and to lower courts generally.

II. The Court of Appeals Improperly Permitted the Commission to Abdicate its Statutory Responsibilities with Respect to an Investigation by its Staff

In its governing statutes, the Commission has been granted substantial powers to interfere with the rights to privacy of private parties. Both § 19(b) of the Securities Act, 15 U.S.C. § 77s(b), and § 21(b) of the Securities Exchange Act, 15 U.S.C. § 78u(b), authorize the Commission to conduct investigations "which, in the opinion of the *Commission,* are necessary and proper for the enforcement of" the respective acts. (Emphasis added.) Each statute provides that staff officers empowered by the Commission may "require the production of any books, papers, or other documents which the *Commission* deems relevant or material to the inquiry." (Emphasis added.)

The Order of Private Investigation issued by the Commission here left everything with respect to the investigation of SCA to the discretion of the SEC staff. There was nothing specific in the Order. Instead, the Commission authorized the

[15] This decision was in fact cited with approval by the Court in *Morton Salt, supra,* 338 U.S. at 652.

staff to investigate and use compulsory process for any matters relating, *inter alia,* to SCA's:

> ...Financial statements
>
> ...Description of business and property
>
> ...Acquisition or disposition of assets.

Because almost everything a corporation does can be related in one way or another its "financial statements," the Commission's Order here, in effect, authorized the staff to investigate any aspect of SCA's business the staff chose.

According to the Court of Appeals, this kind of order was neither fatally vague nor an abdication by the Commission of its statutory responsibilities. As the Court put it, the Commission may operate "at the level of policy determination" and leave everything else to its staff. A. 16a. Any result which required the Commission to do more in the way of controlling its staff, the Court reasoned, would "stagnate the Commission and frustrate its statutory mission." A. 15a. Thus, the Court of Appeals held, a private order authorizing an investigation of a corporation's "financial statements" was proper.

If allowed to stand, this conclusion does violence to the plain requirements of the securities laws. The text of § 19(b) of the Securities Act and § 21(b) of the Securities Exchange Act could not be clearer: the "Commission" must make certain fundamental determinations about the scope of the investigation *before* staff compulsory process is appropriate. As a creature of statute, the Commission cannot abdicate its important statutory responsibilities. *See CAB v. Delta Air Lines, Inc.,* 367 U.S. 316 (1961).[16]

[16] As one court has noted:

> It is not disputed that the agency, embodied by the five Commissioners, must of necessity delegate a large portion of the responsibility for administrative fact gathering and fact finding responsibility to its employees. *However, some functions are so*

Here, the Commission wholly left to its staff the determination of what subjects pertaining to SCA would actually be investigated and when compulsion could be used to secure documents in connection with the investigation of these subjects. As Mr. Justice Douglas has explained, the requirement in the securities law that the Commission exercise its responsibility over its staff in connection with the use of the subpoena power is based on very sound considerations:

> One policy consideration kept us [at the Commission] from a lot of trouble and embarrassment. Eager beavers on the SEC staff wanted me to sign subpoenas in blank so that without further ado they could fill in anyone's name and any documents or other files they wanted to obtain. But we always denied those requests, believing that subpoenas had to be closely delimited, and in the interests of even corporate privacy, only select documents should be subpoenaed.

W. DOUGLAS, GO EAST, YOUNG MAN 293 (1974).

---

primary and so basic to the implementation of the statute as to be nondelegable. Functions consituting final agency action, such as administrative adjudications and rule making, must be made or ratified by the Commissioners and may not be delegated to subordinates under broad grants of authority. *Congress did not intend to provide the Commissioners with the right to effectively abdicate responsibility in any area. While intra-agency delegation is a necessity in carrying out some of its functions, such delegation cannot be excessive.* As stated by Professor Davis:

> "The single administrator, or the three or five or seven or eleven commissioners, are not provided with a staff of five hundred or a thousand and then expected to take all action without subdelegation. At the same time, the courts stand guard to prevent undue subdelegation to lowly subordinates who may act irresponsibly. The courts have often found judicial intervention desirable to protect against what has been thought to be excessive delegation." I Davis, Administrative Law Treatise, Sec. 9.01, (2nd ed., 1967).

Relco, Inc. v. Consumer Prod. Safety Comm., 391 F. Supp. 841, 845-46 (S.D. Tex. 1975)(emphasis added)(footnotes omitted).

The Court of Appeals specified no standard for Commission orders and it felt "some uncertainty about the precise point at which... [Arthur Young] would draw the line between the delegable and the nondelegable." A. 14a. We respectfully question how this uncertainty could have developed, for Arthur Young's position was clear: under the law the Commission must establish reasonably discrete topics that are actually under investigation and authorize its staff to issue compulsory process only with respect to those topics.

In this case, for example, as the Commission staff advised the District Court, the investigation of SCA concerned "alleged looting of SCA assets and self-dealing by SCA insiders through a scheme of selling over-priced property to SCA by SCA insiders." A. 19a. This level of specificity by the Commission in its Order would, in our view, have been proper under the law. It would have clearly set forth the exact nature of the investigation and appropriately served to limit the discretion of the Commission staff in issuing compulsory process. It would not have sanctioned staff fishing expeditions for documents with respect to subjects which ranged far beyond the actual investigation. It would not have supported the enforcement of the subpoena by the courts below.

It is no answer to say, as the Court of Appeals did, that if the Commission must be reasonably specific in its order of private investigation, it cannot investigate and its statutory mission would be "frustrated." A. 15a. Surely, it would not frustrate the Commission's statutory mission if the agency were required to specify reasonably discrete subjects (*e.g.*, looting and self-dealing) as opposed to extremely broad and vague ones ("financial statements"). Indeed, every attorney who frames discovery requests — whether in private practice or Government practice — can be, and must be, reasonably specific. The Commission has clearly shown in this very case that it can be reasonably specific in its document requests and, yet, investigate. As set forth above, the Commission staff made five specific requests to Arthur Young for documents pertaining

to SCA in September 1975 and received a voluminous number of documents in response. In short, it is not only possible for an agency to be specific, but even the Commission can do it.

Further, even if the statutory restrictions did, in fact, have a frustrating effect on Commission inquiries—a suggestion which has *never* previously been made by any court—this would be no excuse for the agency to violate the statute. Plainly its obligation would be to report the situation to the Congress to seek to be relieved of the restrictions if constitutionally permissible.

Accordingly, there was no basis for finding that the Commission's broad and vague Order of Private Investigation was lawful and that the Commission exercised proper control over its staff.

III. The Court of Appeals Improperly Rendered Judicial Review of Agency Compulsory Process Meaningless

This case presents a perfect example of how judicial acceptance of a vague Commission order of private investigation renders meaningless judicial review of a subpoena issued pursuant to that order. The Court of Appeals justified the broad demands in the subpoena on the grounds that the Commission's Order of Private Investigation set forth very broad subjects for review. A. 20a-21a. Under the Court of Appeals' standard, as announced in both this case and in another recent decision, the only function of a reviewing court in considering the relevance of agency demands for documents is to compare the subpoena with the "general purposes of...[the] investigation...as announced by the agency." *FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir.), *cert. denied*, 431 U.S. 974, *reh. denied.*, 434 U.S. 883 (1977).

By accepting a vague Commission order and enforcing demands for documents in the subpoena which extended well beyond the matters actually under investigation, the Court of

Appeals has abdicated its responsibilities and deprived Arthur Young of the important protections provided by Congress when it injected the judiciary into the enforcement process. The Court of Appeals has reduced the judiciary's role to the one empty step: matching an agency staff demand for documents with a broad agency order of private investigation. The result is that the broader the agency description of the investigation, the broader the demand for documents which may be without meaningful judicial scrutiny.[17] Thus every piece of paper in a citizen's file is automatically reachable under the court's formulation if the agency says the investigation is broad. For example, if the Commission says that it is investigating General Motor's "financial statements," under the standards formulated by the Court of Appeals, General Motors, its independent accountant, and virtually anyone else transacting business with General Motors must produce for agency staff personnel every piece of paper in its files.

---

[17] In another case, the court below recognized that a vague and ambiguous administrative agency decision "makes meaningful [judicial] review of that decision impossible." *Am. Smelting & Ref. Co. v. FPC*, 494 F.2d 925, 945 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974); *Air Line Pilots Ass'n v. CAB*, 475 F.2d 900 (D.C. Cir. 1973); *FTC v. Crowther*, 430 F.2d 510 (D.C. Cir. 1970).

Further, Commission regulations require that a person served with a subpoena be shown the Commission's Order of Private Investigation. 17 C.F.R. § 203.7(a). The purpose of this requirement is to enable the person served with the subpoena to "have the fullest opportunity to determine his rights with respect to... producing documents." 3 L. Loss, Securities Regulation 1950 (2d ed. 1961). This right is also effectively frustrated when the Commission is not specific in its private order. As the Court below once put it, an agency must articulate what it is doing because, while the Court is "required to give proper weight to such [agency] expertise...it is not entitled to rely blindly on such purported expertise...[the agency] cannot take refuge in its alleged expertise...." *Pub. Serv. Comm. v. FPC*, 436 F.2d 904, 906-07 (D.C. Cir. 1970) (footnote omitted).

This Court has repeatedly made clear that such judicial abdication is improper. In a subpoena enforcement action the burden of establishing the relevance of documentary requests is on the agency. *See United States v. Powell,* 379 U.S. 48 (1964); *United States v. Bisceglia, supra; United States v. LaSalle Nat'l Bank,* 57 L. Ed. 2d 221 (1978); *Fisher v. United States,* 425 U.S. 391 (1976); *CAB v. Hermann,* 353 U.S. 322 (1957); *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501 (1943). It has also long mandated that "once a...[subpoena] is challenged it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose" and to ensure that it is "no broader than necessary to achieve its purpose." *United States v. Bisceglia, supra,* 420 U.S. at 146, 151 (1975).

In the instant case, the Court of Appeals refused to apply this standard. As we have noted, the Commission's Order of Private Investigation authorized an investigation, *inter alia,* of SCA's "financial statements." The record below, however, makes clear that the Commission's actual investigation of SCA was in fact much narrower. Indeed, the only evidence offered below by the Commission staff as to the scope of its investigation, an affidavit from a Commission investigator, indicated that the Commission was investigating *limited subjects* pertaining to allegations of looting and self-dealing by SCA, a former officer of SCA, and certain companies which were controlled by that former officer. As the Commission investigator put it in his affidavit:

> Certain of the information obtained in the investigation to date indicates that there have been direct and indirect transactions between SCA and present and former management of SCA which may involve a diversion or other misuse of SCA's assets. In this connection, for example, inquiry is being made into (a) substantial advances of cash made by SCA to a company controlled by SCA's former President and the propriety of reporting such advances...as receivables arising from services rendered to

> that controlled company; (b) the timeliness and adequacy of the disclosure...that such receivables did not arise from services rendered...and (c) the timeliness and adequacy of SCA's disclosures concerning transactions whereby SCA purchased parcels of land from its former President through straw entities and nominees at prices inflated by about $2.5 million.

Joint Appendix Below p. 17.

If the subpoena issued to Arthur Young had related solely to those subjects, this case would not have arisen. Arthur Young not only did not question the Commission's right to investigate these subjects, but it also voluntarily produced documents pertaining to them before the issuance of the subpoena. But the Commission staff did not limit the subpoena to documents pertaining to the specific transactions described in the affidavit or to general subjects reasonably related to looting or self-dealing. Instead the Commission asked for, and the Court enforced, a demand for the kitchen sink from Arthur Young. The staff's subpoena indiscriminately swept up the unrelated documents in Arthur Young's files along with those arguably relevant.

If the requirements of *Powell, Bisceglia,* and related cases are to have any substance, we believe that this Court should reemphasize the prerequisites to court enforcement of an agency subpoena. The agency must be reasonably specific in its investigatory orders and must present to the reviewing court evidence of the matters actually under investigation, and the court may enforce only those demands that are sustained by this evidence.

IV. The Court of Appeals' Decision Squarely Conflicts With a Seventh Circuit Decision Considering the Same Issues

In our reply brief to the Court of Appeals, we called the Court's attention to a then recent decision of the Seventh Circuit considering virtually identical issues. *CAB v. United Airlines,*

Inc., 542 F.2d 394 (7th Cir. 1976). The Court below, *without even citing this decision,* entered a decision squarely in conflict with the Seventh Circuit's holding.

In *United,* the Civil Aeronautics Board requested that United Airlines produce six broad types of documents not limited by specific subject matter (*e.g.*, reading files, expense reports, memoranda) in connection with a CAB investigation of United.[18] United offered to provide the Board with all documents relating to what it understood to be the subject of the Board's investigation — alleged unlawful political contributions made by the airline. However, as did the Commission here, the Board refused to limit its requests to the matters actually under investigation and, instead, demanded access on a virtually unrestricted basis to all of United's files. According to the Board, it was entitled "to unlimited access to all the carrier's records" in order to conduct its investigation. 542 F.2d at 396.

The District Court granted summary judgment for United and refused to enforce the CAB's broad demands. The Seventh Circuit affirmed, holding that, notwithstanding the Board's broad regulatory charter, the Board was *not* entitled to conduct a fishing expedition through a private party's files. The Court held that:

> [T]he decisions uniformly require that an investigative demand be reasonably definite and reasonably relevant to some proper investigative purpose. *The Board cites no case, and we have found none, holding that any statute has conferred a general warrant power on any agency.* Such a statute would at least raise serious problems under the Fourth Amendment.

542 F.2d at 399 (emphasis added).

---

[18] The subpoena to Arthur Young was in identical form, requesting 14 categories of documents by type (*e.g.*, "interoffice correspondence and/or memoranda...; permanent files; correspondence to and from SCA...") and not by subject matter.

According to the Seventh Circuit, no administrative agency is entitled to open access to a private party's files just because the agency asserts that it is looking for potential violations of the law. "[The Board's] obligation is of course not satisfied by the recital that the purpose of the investigation is *to determine compliance with the law.* The same could be said for any general warrant." *Id.* at 402 (emphasis added). The Court held that the agency must, in good faith, set forth some specific purpose before it may investigate and then can compel documentary production only in response to specific demands relevant to the stated investigatory purpose.

> Given the requirement that a demand [by the Board] be reasonably relevant to a proper investigative purpose, the Board must of course have such a purpose...of relevance itself. *Further, the Board must disclose its purpose to enable a court to make a determination of relevance.* Otherwise no inquiry 'into the underlying reasons for the examination'...*is possible.*

Id. at 402 (emphasis added)(citations omitted).

The Commission's actions in this case, which were upheld by the circuit court, are essentially the same as those of the Board, which were condemned by the Seventh Circuit in *United. First,* here, as in *United,* the Commission had authorized its staff to conduct a broad investigation, in effect, "to determine compliance with the law." As the Board in *United* did not limit its investigation to alleged unlawful political contributions, so here, the Commission did not specify in its Order of Private Investigation that the investigation concerned the allegations of looting and self-dealing which its staff says are actually the subject of inquiry. According to the Seventh Circuit, this kind of agency investigation is improper; according to the D.C. Circuit, it is proper.

Second, as did the CAB in *United,* the Commission staff here sought unlimited access to Arthur Young's documents. According to the District of Columbia Circuit, this was proper. However, according to the Seventh Circuit, the CAB could not

simply demand documents in this manner for one broad and undefined investigation. Instead, the Seventh Circuit held that, before a court could enforce the Board's demand, the Board had to state specifically the purpose of its investigation and then frame requests for documents relevant to the stated purpose. According to the court in *United,* absent such specificity, the Board's broad and nonspecific demand to United was unlawful and would not be enforced by the court.

The Seventh Circuit might well have been speaking of this case.[19] Yet, the District of Columbia Circuit took an exactly contrary position. Accordingly, we respectfully submit that review by this Court is necessary to resolve this clear conflict among the circuits.

---

[19] The situation here is even more compelling than that in *United.* United Airlines is a regulated air carrier subject to stringent control by the CAB. This control is far more pervasive than control by the SEC over private industry. Indeed, the operative section of the Federal Aviation Act does not specifically require that the Board give its staff directions in connection with investigations as does the Securities Act and the Exchange Act; instead, the Federal Aviation Act provides, in pertinent part, that "[t]he Board shall at all times have access...to all accounts, records, and memorandums...kept or required to be kept by air carriers...." 49 U.S.C. § 1377(e). As we have previously indicated, under the securities laws, the Commission must do far more that the Board in connection with investigations. *A fortiori,* the Commission must meet the tests of specificity set forth in *United.*

Conclusion

For the foregoing reasons, we respectfully submit that a petition for *certiorari* should issue to review the instant decision of the United States Court of Appeals for the District of Columbia Circuit.

Dated: October 20, 1978

Respectfully submitted,

Carl D. Liggio
John E. Matson

Arthur Young & Company
277 Park Avenue
New York, New York 10017

Milton V. Freeman
Stephen M. Sacks

Arnold & Porter
1229 19th Street, N.W.
Washington, D.C. 20036

Attorneys for Petitioner
Arthur Young & Company

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1716

SECURITIES AND EXCHANGE COMMISSION

v.

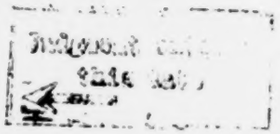
ARTHUR YOUNG & COMPANY, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(D.C. Misc. No. 76-0098)

Argued May 16, 1977

Decided July 24, 1978



Stephen M. Sacks, with whom *Milton V. Freeman* was on the brief, for appellant.

Glynn L. Mays, Attorney, Securities and Exchange Commission, with whom *David Ferber*, Solicitor, and *David J. Romanski*, Assistant General Counsel, Securities and Exchange Commission, were on the brief, for appellee. *Peter M. Sullivan*, Attorney, Securities and Exchange Commission, also entered an appearance for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before BAZELON, LEVENTHAL and ROBINSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: Arthur Young & Company, a partnership of certified public accountants, appeals from an order of the District Court directing it to comply with a subpoena duces tecum issued by the Securities and Exchange Commission. Review is sought in this court on grounds that the investigative order of the Commission authorizing the subpoena is legally deficient,[1] that relevance of the subpoenaed documents to the investigation does not sufficiently appear,[2] and that obedience to the subpoena will be unduly burdensome.[3] We find that these arguments do not withstand scrutiny as justification for denying enforcement of the subpoena. We conclude, however, that enforcement should be conditioned upon reimbursement of appellant's costs of compliance to the extent that otherwise the expenses would become unreasonable.[4] We modify the District Court's enforcement order accordingly, and affirm it as so modified.

I

The pertinent facts are undisputed. The challenged subpoena emanates from a Commission investigation of SCA Services, Inc. (SCA), a publicly-held corporation engaged primarily in waste disposal services[5] and regis-

[1] Discussed in Part II *infra.*

[2] Discussed in Part III *infra.*

[3] Discussed in Part IV *infra.*

[4] Discussed in Part IV *infra.*

[5] Appellant provided these services at 94 different locations in 28 states and the District of Columbia, deriving revenues of approximately $149 million during the fiscal year ending March 31, 1975. Joint Appendix (J. App.) 26.

tering securities with the Commission.[6] Appellant has been SCA's principal independent auditor since 1973. On September 25, 1975, the Commission's staff requested, and at its own cost appellant supplied, five groups of materials[7] bearing on transactions between SCA and Christopher Recklitis, its then president and chief operating officer.[8] On October 21, 1975, on the basis of information presented by the staff, the Commission ordered a private investigation[9] into possible violations by SCA and others of the antifraud provisions of the federal securities laws.[10] The order instructed the staff to ascertain whether there were material factual untruths or omissions in

[6] Pursuant to Securities Exchange Act of 1934, § 12(b), 15 U.S.C. § 78*l*(b) (1976).

[7] This response involved review of approximately 300 to 400 work binders and files, and copying of some of the material extracted, at a cost of more than $15,000. J. App. 29-30.

[8] As SCA's independent auditor, appellant renders opinions on the company's financial statements. J. App. 26. Preparation therefor includes periodic review of SCA's financial records, copying of relevant SCA documents, and preparation of workpapers and other materials reflecting the review and audit work performed. J. App. 26-27. SCA maintains the financial records in fifteen offices. J. App. 27. Appellant's records on SCA audits are located primarily in its offices in ten different cities. J. App. 27-28.

[9] Pursuant to Securities Act of 1933, § 19(b), 15 U.S.C. § 77s(b) (1976), and Securities Exchange Act of 1934, § 21(b), 15 U.S.C. § 78u(b) (1976).

[10] J. App. 3-4. In normal functioning, the staff conducts a preliminary inquiry prior to issuance of a formal order of investigation. See 17 C.F.R. § 202.5(a) (1977). Since the staff lacks power to employ compulsory process without specific authorization from the Commission, preliminary inquiries are necessarily limited.

statements filed by SCA with the Commission and disseminated by it to the public;[11] more specifically, whether

> [t]he aforementioned registration statements [of SCA] . . . include untrue statements of material facts or omit to state material facts . . . concerning among other things:
>
> 1. Interest of management and others in certain transactions.
> 2. Financial statements.
> 3. Description of business and property.
> 4. Acquisition or disposition of assets.[12]

To carry out its investigative responsibilities, the staff was empowered to subpoena "any books, papers, correspondence, memoranda, or other records deemed relevant or material to the inquiry. . . ." [13]

From its beginning as an inquiry into suspected self-dealing and looting by SCA's management, the investigation blossomed into one encompassing the full range of SCA's financial affairs, including the caliber of audits conducted by appellant. So it was that on April 23, 1976, the Commission's staff, purportedly pursuant to the investigative order, issued the undeniably broad subpoena that precipitated this litigation.[14] The subpoena demands 14 different categories of documents relating to SCA over

---

[11] See Securities Act of 1933, § 17(a), 15 U.S.C. § 77q(a) (1976); Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1976); 17 C.F.R. § 240.10(b)-5 (1977).

[12] J. App. 3-4.

[13] J. App. 4.

[14] As Commission counsel informed the District Court "[w]hat we are basically looking for are their audit and tax work papers and every document relied upon in preparing the audit and tax reports." J. App. 56-57.

a six-year period;[15] and within these 14 categories it calls for documents pertaining to 29 individuals and entities,[16] to "[a]ll officers, directors and employees (present and past)" of SCA,[17] and to "any special engagements, projects or management consulting services" performed by appellant for SCA.[18]

---

[15] Item 1 of the listing annexed to the subpoena in relevant part reads:

> All documents including but not limited to (1) audit programs; (2) internal control evaluation; (3) schedules prepared by personnel of Arthur Young & Company and/or SCA Services, Inc., subsidiaries or affiliates; (4) documents received by Arthur Young & Company in the course of the audit; (5) memoranda relative to the audit, audit conclusions, technical matters, policy, accounting theory, or auditing problems; (6) review notes or point sheets; (7) interoffice correspondence and/or memoranda relating to topics mentioned in (5) above; (8) permanent files; (9) correspondence to and from SCA Services, Inc., its officers, directors, shareholders, employees or other persons related directly or indirectly with SCA Services, Inc., subsidiaries and affiliates; (10) separate financial statements in your possession of SCA Services, Inc., subsidiaries and affiliates; (11) engagement letters; (12) all billings and time records; (13) papers, documents and other matters used in the preparation of tax returns filed with federal authorities relating to taxes payable on income; and (14) other documents in your possession or under your control relating to the examination of the financial statements of SCA Services, Inc., subsidiaries and affiliates for the years ended March 31, 1970, 1971, 1972, 1973, 1974 and 1975.

J. App. 10.

[16] J. App. 10.

[17] J. App. 11.

[18] J. App. 10.

Appellant refused to honor the subpoena.[19] The Commission then sought enforcement in the District Court and appellant promptly moved to quash. The court, concluding that the investigation pursued a lawfully authorized purpose and that the subpoenaed materials were relevant thereto, ordered enforcement,[20] but subject to two conditions designed to ameliorate the burden of compliance. One was that the documents be examined at the offices of appellant wherein they were ordinarily kept;[21] the other was that the Commission absorb the expense of copying all documents that appellant might agree to release temporarily for that purpose.[22] The court made plain, however, that "[f]or those documents that [appellant] determines it cannot allow to leave its possession, [appellant] shall provide copies to the Commission."[23] Dissatisfied with this disposition, appellant brought the controversy here.[24]

II

The Securities and Exchange Commission is statutorily authorized to "make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate" provisions of the federal securities laws[25] or "the rules or regulations thereunder . . ."[26] For that purpose, "any member of the Commission or any officer designated by it is empowered to . . . require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry."[27] Beyond that, in the event of disobedience, the Commission can solicit the hand of the court to exact compliance.[28] These weapons, to be sure, are potent, but hardly dispensible in the protection of the investing public and the fairness and honesty of the Nation's financial markets.

In the case at bar, however, we are first confronted with the claim that the order launching the investigation in suit is fatally lacking in specificity. It is said that the Commission has the responsibility for setting both the

---

[19] In one instance, however, appellant did cooperate in the investigation, even after service of the subpoena in suit, by supplying 227 different documents from its files in response to a request from the Commission's staff. J. App. 30-31.

[20] *SEC* v. *Arthur Young & Co.*, Misc. No. 76-0098 (D.D.C. July 13, 1976) (unreported), at 2, J. App. 101.

[21] *Id.* at 3, J. App. 102.

[22] *Id.* at 3-4, J. App. 102-103.

[23] *Id.* at 4, J. App. 103.

[24] A panel of this court denied appellant's motion for a stay of the District Court's order pending appeal. *SEC* v. *Arthur Young & Co.*, No. 76-1716 (D.C. Cir. Aug. 20, 1976). Appellant and the Commission's staff have agreed upon procedures for production of materials pending resolution of the appeal.

[25] The reference here is to Title 15 of the United States Code, which embraces the entirety of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1976), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1976), within which all statutory provisions relevant to this litigation are to be found.

[26] Securities Exchange Act of 1934, § 21(a), 15 U.S.C. § 78u(a) (1976).

[27] "For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry." Securities Exchange Act of 1934, § 21(b), 15 U.S.C. § 78u(b) (1976). Compare Securities Act of 1933, § 19(b), 15 U.S.C. § 77s(b) (1976).

[28] Securities Exchange Act of 1934, § 21(c), 15 U.S.C. § 78u(c) (1976).

scope of its investigations and the limits within which its investigative staff may resort to compulsory process; in appellant's words, that "it is the *Commission* which must determine what basic subjects will be investigated and the areas in which private parties can be compelled to produce documents in connection with such investigations." [29] By what is termed "a vague order of this breadth," [30] appellant argues that "the Commission has left wholly to its staff the determination of what subjects pertaining to SCA will actually be investigated and when compulsion may be used to secure documents in connection with the investigation of these subjects." [31] We do not agree.

Congress has endowed the Commission, not unlike other agencies,[32] with broad power to conduct investigations [33]—"such . . . as it deems necessary to" ferret out violations of the federal securities laws and implementing regulations, whether consummated or incipient [34]—and in that connection to call for production of relevant materials by those who seem to have them.[35] There are, of course,

[29] Brief for Appellant at 18 (emphasis in original).

[30] *Id.* at 19.

[31] *Id.* at 20.

[32] See 1 K. Davis, Administrative Law Treatise § 3.03 (1958).

[33] See *In re SEC*, 84 F.2d 316, 318 (2d Cir.), *rev'd and vacated as moot sub nom. Bracken* v. *SEC*, 299 U.S. 504, 57 S.Ct. 18, 81 L.Ed. 374 (1936); *Boehm* v. *United States*, 123 F.2d 791, 808 (8th Cir. 1941), *cert. denied*, 315 U.S. 800, 62 S.Ct. 794, 86 L.Ed. 1223 (1942); *Consolidated Mines* v. *SEC*, 97 F.2d 704, 708 (9th Cir. 1938); *SEC* v. *First Security Bank*, 447 F.2d 166, 168 (10th Cir. 1971), *cert. denied*, 404 U.S. 1038, 92 S.Ct. 710, 30 L.Ed.2d 729 (1972).

[34] See text *supra* at notes 25-26.

[35] See note 27 *supra*.

limits; to begin with, "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." [36] Moreover, while the statutory powers of federal regulatory agencies to investigate have traditionally been extensive,[37] "the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." [38] The federal courts stand guard, of course, against abuses of their subpoena-enforcement processes [39]

[36] *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 369, 94 L.Ed. 401, 416 (1950).

[37] See 1 K. Davis, Administrative Law Treatise § 3.03 (1958).

[38] *See* v. *City of Seattle*, 387 U.S. 541, 544, 87 S.Ct. 1737, 1740, 18 L.Ed.2d 943, 947 (1967). See also *United States* v. *Morton Salt Co.*, *supra* note 36, 338 U.S. at 652-653, 70 S.Ct. at 369, 94 L.Ed. at 416; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 505, 90 L.Ed. 614, 629 (1946).

[39] *United States* v. *Powell*, 379 U.S. 48, 58, 85 S.Ct. 248, 255, 13 L.Ed.2d 112, 119-120 (1964); *Oklahoma Press Publishing Co.* v. *Walling*, *supra* note 38, 327 U.S. at 216, 66 S.Ct. at 509, 90 L.Ed. at 634. "Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the [subpoenaed party] or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States* v. *Powell*, *supra*, 379 U.S. at 58, 85 S.Ct. at 255, 13 L.Ed.2d at 120. And while the court's role in subpoena enforcement is narrow, see cases cited *supra*, within its confines it is potent:

> A court may always consider such questions as unreasonable searches and seizures, self-incrimination, undue breadth of the subpena, improper inclusion of irrelevant information, administrative authority to make the particular investigation, power to require disclosures con-

but constitutional mandates aside,[40] " '[t]he gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.' " [41] Resultantly, it has long been clear that "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." [42]

Surely we cannot characterize the challenged investigation as unreasonable. Its stated purpose is to inquire into possible infringements of the securities laws or implementing regulations by "SCA, its officers, directors and employees" [43] or by "any other persons." [44] The predicate for the investigation was a preliminary indication [45] of falsifications or misleading omissions in registration statements, proxy materials and periodic reports filed with the Commission and disseminated to the public.[46] The sus-

---

cerning activities outside the agency's regulatory authority, and proper issuance of the particular subpena.

1 K. Davis, Administrative Law Treatise § 3.12, at 216 (1958) (footnotes, citing abundant authority, omitted).

[40] See text *supra* at note 38.

[41] *United States* v. *Morton Salt Co.*, *supra* note 36, 338 U.S. at 652-653, 70 S.Ct. at 369, 94 L.Ed. at 416, quoting *Oklahoma Press Publishing Co.* v. *Walling*, *supra* note 38, 327 U.S. at 208, 66 S.Ct. at 505, 90 L.Ed. at 629.

[42] *United States* v. *Morton Salt Co.*, *supra* note 36, 338 U.S. at 652, 70 S.Ct. at 369, 94 L.Ed. at 416.

[43] J. App. 4.

[44] J. App. 4.

[45] "Even if one were to regard [a] request for information . . . as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." *United States* v. *Morton Salt Co.*, *supra* note 36, 338 U.S. at 652, 70 S.Ct. at 369, 94 L.Ed. at 416.

[46] J. App. 3-4.

pected violations relate to such matters as the interest of SCA's management and others in certain transactions, SCA's financial statements and its descriptions of businesses, properties, acquisitions and dispositions of assets.[47] Despite their apparent breadth—which appellant attacks —these are all areas of legitimate concern to the Commission in the discharge of its statutory responsibilities, and categories of data generally required to be submitted to the Commission and disclosed to the investing public.[48]

---

[47] J. App. 3-4.

[48] See Securities Act of 1933, §§ 5, 7, 15 U.S.C. §§ 77e, 77g (1976); *id.* Schedule A(8), (22), (24), (25), (26), 15 U.S.C. § 77aa (1976); Securities Exchange Act of 1934, §§ 12, 13, 14(a), 15 U.S.C. §§ 78*l*, 77m, 77n(a) (1976); 17 C.F.R. § 20.14a (1977).

The Commission submitted to the District Court the affidavit of a staff accountant elucidating lines of inquiry that the Commission proposes to pursue. The affidavit in part recites:

> Certain of the information obtained in the investigation to date indicates that there have been direct and indirect transactions between SCA and present and former management of SCA which may involve a diversion or other misuse of SCA's assets. In this connection, for example, inquiry is being made into (a) substantial advances of cash made by SCA to a company controlled by SCA's former President and the propriety of reporting such advances, in SCA's financial statements for at least fiscal year 1974, as receivables arising from services rendered to that controlled company; (b) the timeliness and adequacy of the disclosure in SCA's annual report for fiscal year 1975 that such receivables did not arise from services rendered and that such receivables were being repaid; and (c) the timeliness and adequacy of SCA's disclosures concerning transactions whereby SCA purchased parcels of land from its former President through straw entities and nominees at prices inflated by about $2.5 million.

J. App. 17. In oral argument before the District Court, Commission counsel undertook a similar explanation. J. App. 46-

We must also discard any notion that the Commission's investigative order is too indefinite as to the documents that its staff might apparently subpoena. Indeed, any such conclusion is foredoomed by our holding that the scope of the investigation itself is adequately bounded.[49] The Commission's subpoena power is coextensive with its investigative power; by statute it may "require the production of any [document] which the Commission deems relevant or material to the inquiry," [50] and we cannot say that the Commission's interest in the documents demanded of appellant is untoward. The investigation focuses on the financial statements and activities of SCA, a publicly-held corporation, and during the period under scrutiny appellant has been the principal independent accountant for that corporation, examining and certifying what the Commission believes to be inaccurate financial statements. The adequacy of the examinations leading to those certifications thus plainly emerges as a logical and permissible subject of inquiry. We perceive no legal impropriety in a probe into files and records prepared and maintained by appellant in connection with its audits of the questioned

49, 57-61, 64. Appellant does not question the Commission's power to investigate the subjects specified in the affidavit, but complains that the affidavit purports to justify considerably less than the total demand of the subpoena, with the result that its enforcement should have been correspondingly limited. By our assessment, however, the particulars of the Commission's investigative order, when coupled with the affidavit's disclosure that the investigation extends to the adequacy of appellant's audits, sufficiently specifies the scope of the investigation and reveals that it is at least as broad as the subpoena's call for documents. In this view, we need not address appellant's further contention that counsel's oral representations to the District Court could not substitute for evidence of investigative scope.

[49] See text *supra* at notes 29-48.

[50] See note 27 *supra*.

financial practices and disclosures for SCA, or of those for others thought to be participants in its suspected misdoings.[51]

Appellant's argument, however, takes a somewhat different tack. It is said that the Commission, by allowing exploration of such of SCA's activities as its "[f]inancial statements," [52] "[d]escription[s] of business and property" [53] and "[a]quisition[s] or disposition[s] of assets," [54] has given its staff carte blanche to examine anything it chooses, and thereby has abdicated its statutory responsibilities. So broadly stated, however, this contention collides with our earlier conclusion that the informa-

[51] "In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar." *United States* v. *Benjamin*, 328 F.2d 854, 863 (2d Cir.), *cert. denied*, 377 U.S. 953, 84 S.Ct. 1631, 12 L.Ed.2d 497 (1964). The role of the accountant in securities transactions is vital. The keystone of the Securities Act of 1933 is its substitution of a policy of disclosure for one of caveat emptor; it closes the "channels of . . . commerce to security issues unless and until a full disclosure of the character of such securities has been made" through a registration statement filed with the Commission. H.R. Rep. No. 85, 73d Cong., 1st Sess. 3 (1933). When Congress pondered the methodology by which disclosure could be ensured, it at one time considered the idea of a corps of federal auditors to examine companies proposing to market securities, but in response to testimony from the accounting profession, see Hearings on S. 875 Before the Senate Comm. on Banking and Currency, 73d Cong., 1st Sess. 55-63 (1933), decided instead to rely on certifications of independent public or certified accountants. See 15 U.S.C. §§ 77aa(25), (26), (27) (1976). See also Securities Exchange Act of 1934, § 13(a), 15 U.S.C. § 78m(a) (1976).

[52] See text *supra* at note 12.

[53] See text *supra* at note 12.

[54] See text *supra* at note 12.

tional categories designated in the investigative order [55] sufficiently confine the scope of the investigation.[56] Nor can we agree that, to the extent that the task of particularization of documents within those categories involves some exercise of judgment, delegation of that activity to staff officers was forbidden.

We remind once again that Congress has ordained that "[f]or the purpose of any . . . investigation . . ., the production of any [documents] which the *Commission* deems relevant or material to the inquiry" may be required.[57] In its investigative order, the Commission appointed fifteen staff officers to exercise designated functions in connection with the investigation, including the issuance of subpoenas for documents.[58] Appellant concedes that "the Commission need not describe in detail everything that is being investigated . . . and can give its staff some discretion and latitude in conducting investigations." [59] With emphasis on the word "Commission" in the statutory authorization, however, appellant insists that "it is the *Commission* which must determine . . . the areas in which private parties can be compelled to produce documents in connection with such investigations." [60]

We would be less than candid if we failed to acknowledge some uncertainty about the precise point at which appellant would draw the line between the delegable and the nondelegable. Since the Commission's investigative order sets areas—four in number—within which the staff

[55] See text *supra* at note 12.

[56] See text *supra* at notes 29-48.

[57] See note 27 *supra* (emphasis supplied).

[58] J. App. 4.

[59] Brief for Appellant at 18.

[60] Brief for Appellant at 18 (emphasis in original).

purportedly may call for documents,[61] the complaint must again be that the categories designated do not restrict staff discretion tightly enough.

Acceptance of appellant's argument, we think, would stagnate the Commission and frustrate its statutory mission. The Commission constantly engages in large numbers of investigations, each with its own ramifications of informational need. To require Commission members to exercise the substantial amount of supervision that subpoena-detailing would require is to grind its operations to a halt. As the Supreme Court observed three decades ago, "[t]he pyramiding in Washington of all decisions on law enforcement would be apt to end in paralysis," [62] and how the more so today. Sheer necessity dictates that subordinates direct much of the investigative effort, including document-production effort, else the agency will court disaster. We cannot assume that Congress was oblivious to these considerations, and our duty as judges is to construe the Commission's governing legislation, if at all possible, to avoid an absurd result.[63]

Moreover, provision to a small group of administrators of a sizeable supporting staff is utterly inconsistent with the idea that the administrators themselves are to conduct their business without subdelegation. As one authority has noted, "[t]he single administrator, or the three or five or seven or eleven commissioners, are not provided a staff of five hundred or a thousand or two thousand and then expected to take all action without subdelega-

[61] See text *supra* at note 12.

[62] *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 123, 67 S.Ct. 1129, 1135, 91 L. 1375, 1385 (1947).

[63] *Yankee Network* v. *FCC*, 71 App.D.C. 11, 18, 107 F.2d 212, 219 (1949); *Porter* v. *Nowak*, 157 F.2d 824, 825-826 (1st Cir. 1946).

tion."[64] We are unable to shed the belief that in conferring upon the Commission power to investigate extensively and to subpoena documents to that end, Congress anticipated that the Commission's members would function more nearly at the level of policy determination, and might permissibly assign the planning and execution of particular projects to the staff.

So, advertent to these considerations and to our responsibility to interpret legislation consistently with its purpose,[65] we conclude that here no less than elsewhere[66] the agency's statutory charter "should be construed so as to give it the administrative flexibility necessary for prompt and expeditious action on a multitude of fronts."[67]

---

[64] 1 K. Davis, Administrative Law Treatise § 9.01, at 616 (1958).

[65] *United States* v. *Bornstein*, 423 U.S. 303, 310, 96 S.Ct. 523, 528, 46 L.Ed.2d 514, 522 (1976); *First Nat'l Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261, 87 S.Ct. 492, 497, 17 L.Ed.2d 343, 349 (1966); *Hudson Distribs., Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 395, 84 S.Ct. 1273, 1280, 12 L.Ed.2d 394, 400 (1964); *Commissioner* v. *Bilder*, 369 U.S. 499, 504, 82 S.Ct. 881, 884, 8 L.Ed.2d 65, 69 (1962).

[66] Compare *Fleming* v. *Mohawk Wrecking & Lumber Co.*, *supra* note 62, 331 U.S. at 121-122, 67 S.Ct. at 1134-1135, 91 L.Ed. at 1384-1385, distinguishing *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, 62 S.Ct. 651, 86 L.Ed. 895 (1942); *Plapao Laboratories, Inc.* v. *Farley*, 67 App.D.C. 304, 305, 92 F.2d 228, 229, *cert. denied*, 302 U.S. 732, 58 S.Ct. 56, 82 L.Ed. 566 (1937); *Edwards* v. *NLRB*, 189 F.2d 970 (4th Cir.), *cert. denied*, 342 U.S. 870, 72 S.Ct. 112, 96 L.Ed. 654 (1951); *NLRB* v. *Anchor Rome Mills, Inc.*, 197 F.2d 447, 449 (5th Cir. 1952); *NLRB* v. *John S. Barnes Corp.*, 178 F.2d 156, 159 (7th Cir. 1949); *Penfield Co.* v. *SEC*, 143 F.2d 746, 749-751, 154 A.L.R. 1027 (9th Cir.), *cert. denied*, 323 U.S. 768, 65 S.Ct. 121, 89 L.Ed. 614 (1944).

[67] *Fleming* v. *Mohawk Wrecking & Lumber Co.*, *supra* note 62, 331 U.S. at 122, 67 S.Ct. at 1135, 91 L.Ed. at 1385.

We thus reject a construction of the statutory specifications of the Commission's subpoena power that would foreclose subdelegation to selected staff officers of the responsibility for detailing its exercise. That reading is fully harmonious with—indeed, is buttressed by[68]—a companion provision. With exceptions not pertinent here, the Commission has express statutory leave to subdelegate to subordinates "any of its functions," including "act[ions] as to any work, business, or matter."[69] We have no reason to assume that this provision is to mean less than what it seems plainly to say, or that the subpoena power is somehow impliedly excluded from its ambit.

We realize that in particular instances an administrative subpoena could be overzealous, and we share a natural concern over potential abuse. But the possibility that a subpoena may occasionally be ill-advised in its call is not alone a persuasive reason for introducing impractical limits on subdelegation, which may well generate more problems that it would solve.[70] The Commission is itself

---

[68] Compare *id.* at 120-121, 67 S.Ct. at 1134, 91 L.Ed. at 1384.

[69] "In addition to its existing authority, the Securities and Exchange Commission, hereinafter referred to as the 'Commission', shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter. . . ." 15 U.S.C. § 78d-1(a) (1976).

[70] In *Fleming* v. *Mohawk Wrecking & Lumber Co.*, *supra* note 62, 331 U.S. at 123, 67 S.Ct. at 1135, 91 L.Ed. at 1385, Justice Douglas, speaking for the majority, observed that "[t]o tempt the Administrator to solve the problem by supplying all his offices with subpoenas signed in blank would not further the development of orderly and responsible administration." Justice Jackson concurring, remarked:

[Continued]

amply equipped, through its inherent powers to control and rectify the activities of its subordinates, to arrest any irresponsible uses to which its subpoena may be sought to be put. And so long as the courts retain their power of individual inquiry prior to enforcement of administrative subpoenas, there is relatively little for anyone to fear.[71]

III

Another precondition to judicial enforcement of an administrative investigative subpoena is that the documents demanded bear relevance to some subject of the investigation.[72] In the instant case, the District Court was

> convinced that in this case of a broadly based investigation into a complex subject matter, the sub-

[70] [Continued]

> If the Administrator may not delegate his power to sign subpoenas but must personally sign all subpoenas issued in the process of enforcement throughout the United States, one of two practices would be certain to result. He must sign large batches of blank subpoenas and turn them over to subordinates to be filled in over his signature. Or he might sign batches of subpoenas already made out by subordinates, probably without reading them and certainly without examining the causes for their issuance or the scope of the information required. The personal signature of the Administrator on the subpoena under those circumstances is no protection to individual rights.

Id. at 123-124, 67 S.Ct. at 1135-1136, 91 L.Ed. at 1386.

[71] Compare *id.* at 124, 67 S.Ct. at 1136, 91 L.Ed. at 1386 (concurring opinion).

[72] *United States* v. *Powell*, *supra* note 39, 379 U.S. at 57, 85 S.Ct. at 255, 13 L.Ed.2d at 119; *United States* v. *Morton Salt Co.*, *supra* note 36, 338 U.S. at 652, 70 S.Ct. at 369, 94 L.Ed. at 416; *Oklahoma Press Publishing Co.* v. *Walling*, *supra* note 38, 327 U.S. at 209, 66 S.Ct. at 506, 90 L.Ed. at 630; *SEC* v. *Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915, 94 S.Ct. 1410, 39 L.Ed.2d 469 (1974).

> poena request is not so overbroad as to reach into areas irrelevant or immaterial. The materials sought relate to Arthur Young's auditing and other work for SCA and for other individuals, corporations and trusts with whom SCA may have had dealings. The Commission is investigating alleged looting of SCA assets and self-dealing by SCA insiders through a scheme of selling over-priced property to SCA by SCA insiders. The Commission has also indicated that it is investigating Arthur Young's role in preparing the financial statements of SCA. In this regard the materials sought are not clearly irrelevant or immaterial. This being the case, the Commission has made sufficient showing of the relevancy of these materials to justify the Court's enforcement of the subpoena.[73]

Appellant attacks this holding on several grounds, in none of which are we able to concur.

The focal point of the present challenge, like that earlier,[74] is the quantity of data requisitioned by the Commission's subpoena. To reiterate, it asks for all documents in 14 categories amassed over a six-year period in connection with appellants' examinations of financial statements of SCA, its subsidiaries and affiliates,[75] and, to the extent applicable, (a) for "any special engagements projects or management consulting services";[76] (b) for another named corporation, its subsidiaries and affiliates;[77] (c) for an additional 28 named individuals and entities;[78]

[73] *SEC* v. *Arthur Young & Co.*, *supra* note 20, at 2, J. App. 101 (citations omitted).

[74] See Part II *supra*.

[75] J. App. 10.

[76] J. App. 10.

[77] J. App. 10.

[78] J. App. 10-11.

and (d) for all present and past officers, directors, and employees of SCA.[79] A closer look reveals, however, that the scope of the demand is not nearly as broad as at first blush it might seem. The Commission argues forcefully, and appellant does not directly refute, that the 14 categories together comprise but one coherent set of work papers and ancillary materials routinely generated and assembled in any audit.[80] And although the subpoena's call extends beyond SCA and its affiliates to 29 persons and entities and the full range of SCA personnel, the record discloses that appellant has refused to say whether it has performed any work for any of them during the period under investigation,[81] and this wall of silence leaves appellant in much poorer position to press a claim of overbreath. Obviously no production is required vis-a-vis those whom appellant has not served; and, on the other hand, as much of the subpoenaed materials as may be in appellant's possession lies within the ambit of the investigation because the entities and persons for whom they are retained—despite their number—are ostensibly implicated in the questioned SCA financial operations.[82]

Thus we get to the gist of the matter. The investigation is ambitious, yet, as we have held, it is within the Commission's statutory domain.[83] Because the investigation is broad the subpoena's production effort is broad, yet it is no broader. Put another way, though a response to the subpoena may produce a large volume of data, the

[79] J. App. 11. We are told that for fiscal year 1975 SCA had approximately 6,900 employees. Brief for Appellant at 25 n.23.

[80] Brief for Appellee at 23.

[81] J. App. 56-61.

[82] See Part II *supra*.

[83] Part II *supra*.

Commission has established prima facie its potential importance in terms of the investigative objectives. That, we think, is enough.

To begin with, we disagree with appellant that the District Court utilized an erroneous standard in passing on the issue of relevance. The court held that "the materials sought are not clearly irrelevant or immaterial." [84] Appellant asserts that this test stands the burden of proof on its head—that "*before* an agency subpoena may be enforced, the *agency* must prove, *inter alia*, that the documents sought in a subpoena are 'relevant to the purpose' of the matter under investigation." [85] For our part, the difference between the two formulations is chiefly semantical, and certainly is legally inconsequential. The Supreme Court has rebuffed a challenge to the scope of an investigative subpoena when "[t]he evidence sought by the subpoena was not *plainly incompetent or irrelevant* to any lawful purpose . . . ." [86] We ourselves have enforced such a subpoena when "we [could] not say that the requested information is *plainly irrelevant* to the charges contained in the complaint." [87] To treat "relevant" and "not clearly irrelevant" as dichotomous [88] is to overlook

[84] See text *supra* at note 73.

[85] Reply Brief for Appellant at 10, quoting *United States* v. *Powell*, *supra* note 39, 379 U.S. at 57, 85 S.Ct. at 255, 13 L.Ed.2d at 119 (emphasis in original).

[86] *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509, 63 S.Ct. 339, 343, 87 L.Ed. 424, 429 (1943) (emphasis supplied).

[87] *Moore Business Forms, Inc.* v. *FTC*, 113 U.S.App.D.C. 231, 232, 307 F.2d 188, 189 (1962) (emphasis supplied).

[88] Surely that should not be done here, where the District Court's use of "not clearly irrelevant or immaterial" came only after it had unambiguously declared that it would "enforce the Commission's subpoena if . . . the materials sought are relevant to [the] investigation." *SEC* v. *Arthur Young & Co.*, *supra* note 20, at 2, J. App. 101.

the role of relevance as merely the refined expression of one of several elements of a reasonable documental demand.[89] It can hardly be seriously suggested that a request for documents "not plainly irrelevant" is unreasonable.[90]

Carefully analyzed, appellant's stance on relevance is largely another outcropping of its distaste for the size of the production summoned. The essence of its claim is that the Commission has embarked upon an illegal fishing expedition into its files. That would have been a potent argument in the early era of administrative law[91] but it retains scarcely any of its clout today. As Professor Davis observes, "[t]he older cases strongly condemn roving inquiries into private books and records, but the recent cases permit such roving inquiries to whatever extent seems to be necessary to make the power of investigation effective."[92] And as far back as a quarter-century the Supreme Court, addressing the contention that an agency was "engaged in a mere 'fishing expedition' to see if it can turn up evidence of guilt,"[93] commented expansively:

---

[89] See text *supra* at notes 36-42.

[90] Compare *CAB* v. *Hermann*, 353 U.S. 322, 77 S.Ct. 804, 1 L.Ed.2d 852 (1957), directing enforcement of subpoenas when the District Court "found that it could not say 'that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant. . . .'" *Id.* at 323, 77 S.Ct. at 805, 1 L.Ed.2d at 853. As the Supreme Court read the District Court's order, "it duly enforced the [agency's] right to call for documents relevant to the issues of the [agency's] complaint. . . ." *Id.*

[91] See, *e.g.*, *Hale* v. *Henkel*, 201 U.S. 43, 76-77, 26 S.Ct. 370, 379-380, 50 L.Ed. 652, 666 (1906); *FTC* v. *American Tobacco Co.*, 264 U.S. 298, 305-307, 44 S.Ct. 336, 337-338, 68 L.Ed. 696, 700-701 (1924).

[92] 1 K. Davis, Administrative Law Treatise § 3.06, at 183 (1958).

[93] *United States* v. *Morton Salt Co.*, *supra* note 38, 338 U.S. at 641, 70 S.Ct. at 363, 94 L.Ed. at 410.

> We will assume for the argument that this is so. Courts have often disapproved the employment of the judicial process in such an enterprise. . . .
>
> We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan "no fishing expeditions." It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature. More recent views have been more tolerant of it than those which underlay many older decisions.[94]

Continuing, the Court elucidated:

> [A]n administrative agency . . . has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.[95]

So, "[e]ven if one were to regard the request for information . . . as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legiti-

---

[94] *Id.* at 641-642, 70 S.Ct. at 363-364, 94 L.Ed. at 410.

[95] *Id.* at 642-643, 70 S.Ct. at 364, 94 L.Ed. at 411.

mate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." [96]

Today, then, "[t]he gist of the protection is in the requirement . . . that the disclosure sought shall not be unreasonable." [97] Correspondingly, the need for moderation in the subpoena's call is a matter of reasonableness:

> [T]he requirement of reasonableness . . . comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, . . . this cannot be reduced to a formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.[98]

We are mindful, too, that investigative breadth and relevance of sought-after documents—each a vital consideration in subpoena enforcement—are closely related:

> The breadth of an investigation is for the investigators to determine. The breadth of a subpoena or of a search made in records may be excessive, but the test is relevance to the specific purpose, and the purpose is determined by the investigators.[99]

Here, as the District Court correctly stated, the Commission has launched "a broadly based investigation into a complex subject matter," [100] and we have found it both statutorily authorized and reasonable.[101] It is designed to

[96] *Id.* at 652, 70 S.Ct. at 369, 94 L.Ed. at 416.

[97] *Oklahoma Press Publishing Co.* v. *Walling*, *supra* note 38, 327 U.S. at 208, 66 S.Ct. at 505, 90 L.Ed. at 629.

[98] *Id.* at 209, 66 S.Ct. at 506, 90 L.Ed. at 630.

[99] 1 K. Davis, Administrative Law Treatise § 3.06, at 188-189 (1958).

[100] See text *supra* at note 73.

[101] See Part II *supra*.

ascertain whether the federal securities laws or the Commission's regulations have been transgressed; [102] with that aim, it will explore the interrelationships, direct and indirect, of SCA and a number of individuals and entities in a variety of transactions.[103] Appellant, as SCA's chief independent accountant, prepared and certified for SCA publicly-filed and -disseminated statements thought to be inaccurate, a matter upon which appellant's subpoenaed work papers and ancilliary materials could be revealing. They promise to reflect also upon the caliber of appellant's performances in SCA's behalf, and as well upon the nature and extent of any participation in SCA's financial activities by other suspects who might happen to be clients of appellant. These circumstances forge a prima facie case of pertinence of the subpoenaed documents to the ends of the investigation, a showing which appellant, by choice, has not undertaken to rebut. We hold that the requirement of relevance has been met.

IV

Lastly, appellant complains that the subpoena in suit imposes an unconscionable burden, in the constitutional as well as the ordinary sense. We do not doubt that in particular instances administrative subpoenas for document-production could have just that effect. As we have already observed, the Fourth Amendment demands of subpoenas not only relevance in purpose and specificity in command but also such limitation in scope "that compliance will not be unreasonably burdensome." [104] And we agree that "while the [Commission] is entitled to great

[102] J. App. 4.

[103] J. App. 4.

[104] See text *supra* at note 38.

freedom in conducting its investigations, it is not at liberty to act unreasonably . . . ." [105]

Undeniably, the response to the instant subpoena will necessitate a great deal of effort. An uncontroverted affidavit in the record avows that appellant's personnel will have to examine, at more than 15 different offices of the firm [106] and at a cost estimated at more than $100,000, some 2,000 work binders and over 200 correspondence files which when stacked would extend more than 275 lineal feet.[107] On the other side of the ledger, however, are considerations militating against appellant's contention that the subpoena's call is undue. The Commission's investigative power, we have noted, is broad; [108] the materials here sought, we have held, are relevant to an authorized inquiry; [109] and resultantly a demonstration of excessive burden would be hard to come by.[110]

Moreover, the District Court, recognizing that compliance would impose "a heavy burden . . . on a party, which, though involved in the Commission's investigation, is not the primary target of that investigation," [111] took steps to reduce it. The court's enforcement order compels appellant to produce documents for Commission inspec-

---

[105] *SEC* v. *Brigadoon Scotch Distrib. Corp., supra* note 72, 480 F.2d at 1056.

[106] This is so notwithstanding that a majority of the materials are kept at ten of appellant's offices. J. App. 32-33. See note 8 *supra.*

[107] J. App. 33.

[108] See text *supra* at notes 32-35.

[109] See Part III *supra.*

[110] Compare *SEC* v. *Brigadoon Scotch Distrib. Corp., supra* note 72, 480 F.2d at 1056.

[111] *SEC* v. *Arthur Young & Co., supra* note 20, at 3, J. App. 102.

tion only at the offices at which in the ordinary course of business they are kept.[112] Beyond that, appellant is freed from any obligation to copy for the Commission's benefit any document temporarily released for that purpose.[113] But, as the order explicates, appellant must copy for the Commission those documents it wishes to retain continuously in its possession.[114] For reasons we cannot deem insubstantial,[115] appellant insists that the conditions imposed by the District Court would not accomplish enough.

Momentarily at least, we need not ponder on just what decision would be proper on burden were it not further ameliorated, for in our view another factor merits additional study. The financial cost of compliance with the subpoena is principally if not entirely the burden complained of, a circumstance accented by appellant's argument that enforcement—if forthcoming at all—should be made to depend upon reimbursement of the expense incurred.[116] No less than the District Court, we recognize the value of feasible conditions in the effort to minimize the onus of subpoena-compliance,[117] and it is evident that cost-reimbursement could make a great deal of difference here. Continuing, then, the process begun by the District

---

[112] *Id.* at 3-4, J. App. 102-103.

[113] *Id.*

[114] *Id.* at 4, J. App. 103.

[115] See text *infra* at notes 129-133.

[116] Brief for Appellant at 33-36; Reply Brief for Appellant at 12-14.

[117] See *CAB* v. *Hermann, supra* note 90, 353 U.S. at 323, 77 S.Ct. at 805, 1 L.Ed.2d at 853; *Bank of America* v. *Douglas,* 70 App.D.C. 221, 228, 105 F.2d 100, 107, 123 A.L.R. 1266 (1939); *United States* v. *Dauphin Deposit Trust Co.,* 385 F.2d 129, 131 (3d Cir. 1967), *cert. denied,* 390 U.S. 921, 88 S.Ct. 854, 19 L.Ed.2d 981 (1968); *United States* v. *Continental Bank & Trust Co.,* 503 F.2d 45, 48 (10th Cir. 1974).

Court, we pause to consider how far reimbursement of appellant's expense of compliance may have a rightful role in the situation before use.

The power to impose a condition of that sort has achieved recognition,[118] though its source and the predicates for its exercise are less clearly defined. Rationales suggested by appellant extend to contentions that visitation of a heavy burden of obedience amounts to an unreasonable search and seizure violative of the Fourth Amendment, or alternatively to a taking of property without just compensation or due process of law in contravention of the Fifth.[119] We need not range so far, however, to find the authority that appellant invokes.

Enforcement of administrative subpoenas has long been committed, not to administrative tribunals themselves, but instead to the courts.[120] Power to enforce subopenas of

---

[118] See *United States* v. *Davey*, 543 F.2d 996, 1000 (2d Cir. 1976); *United States* v. *Davey*, 426 F.2d 842, 844-845 (2d Cir. 1970); *United States* v. *Friedman*, 532 F.2d 928, 936-937 (3d Cir. 1976); *United States* v. *Farmers & Merchants Bank*, 397 F.Supp. 418, 420-421 (C.D. Cal. 1975), *appeal docketed*, No. 75-3690 (9th Cir.). *Cf. United States* v. *Dauphin Deposit Trust Co.*, *supra* note 117, 385 F.2d at 130; *United States* v. *Continental Bank & Trust Co.*, *supra* note 117, 503 F.2d at 48; *United States* v. *First Nat'l Bank*, 173 F.Supp. 716, 720-721 (W.D. Ark. 1959).

[119] These arguments, upon which we have no occasion to intimate an opinion, have frequently been discarded, usually on the facts of the particular case. *United States* v. *Dauphin Deposit Trust Co.*, *supra* note 117, 385 F.2d at 130; *United States* v. *Friedman*, *supra* note 118, 532 F.2d at 934-935; *United States* v. *Continental Bank & Trust Co.*, *supra* note 117, 503 F.2d at 48. But see *United States* v. *Farmers & Merchants Bank*, *supra* note 118, 397 F.Supp. at 420-421.

[120] "The inquiry whether a witness before the [Interstate Commerce] Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in

the Securities and Exchange Commission is cast in this traditional mold, without limitation on the court's discretion to set terms ensuring that the enforcement order does not become an engine of oppression.[121] Stated somewhat differently, judicial authority to temper enforcement with fairness stems inexorably from congressional entrustment of subpoena enforcement to the judiciary.[122] Surely, then, in formulating protective conditions for administrative subpoenas, courts may resort analogously to techniques conventional to judicial subpoenas,[123] and thus in safeguarding against undue financial outlays may appropriately insist upon a reasonable measure of reimbursement.[124]

---

his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination." *ICC* v. *Brimson*, 154 U.S. 447, 485, 14 S.Ct. 1125, 1136, 38 L.Ed. 1047, 1060 (1894).

[121] See Securities Exchange Act of 1934, § 21(c), 15 U.S.C. § 78u(c) (1970).

[122] *United States* v. *Friedman*, *supra* note 118, 532 F.2d at 936-937.

[123] With respect to the latter, Fed. R. Civ. P. 45(b) specifies:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) *condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable costs of producing the books, papers, documents, or tangible things.*

(emphasis supplied). This provision "disclos[es] a broad congressional judgment with respect to fairness in subpoena enforcement proceedings." *United States* v. *Friedman*, *supra* note 118, 532 F.2d at 937.

[124] *United States* v. *Friedman*, *supra* note 118, 532 F.2d at 937.

As appellant readily concedes, considerations of fairness do not call for reimbursement in every instance, or necessarily for full reimbursement in any given case.[125] There is a continuing general duty to respond to governmental process; in consequence, subpoenaed parties can legitimately be required to absorb reasonable expenses of compliance with administrative subpoenas.[126] It follows that the power to exact reimbursement as the price of enforcement is soundly exercised only when the financial burden of compliance exceeds that which the party ought reasonably be made to shoulder.[127] And what is reasonable will depend—as over the legal spectrum it ultimately does—upon the circumstances of each case.[128] With these concerns in mind, we turn to appellant's claim that the enforcement order under review should provide for reimbursement in a more generous degree than it does.

Appellant represents that compliance with the subpoena, even as conditioned by the District Court, potentially involves costs exceeding $100,000,[129] of which $84,000 expectably will be for document-duplication alone.[130] And

[125] Reply Brief for Appellant at 12 n.17.

[126] *United States* v. *Davey, supra* note 118, 543 F.2d at 1001; *United States* v. *Dauphin Deposit Trust Co., supra* note 117, 385 F.2d at 130; *United States* v. *Friedman, supra* note 118, 532 F.2d at 937; *United States* v. *Continental Bank & Trust Co., supra* note 117, 503 F.2d at 48.

[127] *United States* v. *Davey, supra* note 118, 543 F.2d at 1000-1001; *United States* v. *Dauphin Deposit Trust Co., supra* note 117, 385 F.2d at 130; *United States* v. *Friedman, supra* note 118, 532 F.2d at 938. *Cf. United States* v. *Continental Bank & Trust Co., supra* note 117, 503 F.2d at 48.

[128] *United States* v. *Friedman, supra* note 118, 532 F.2d at 937-938. Compare *United States* v. *Davey, supra* note 118, 543 F.2d at 1001.

[129] J. App. 33.

[130] Brief for Appellant at 31-32.

while under the enforcement order propounded by the District Court, appellant can reduce and even eliminate the $84,000 item by turning originals over to the Commission for copying at its own expense,[131] for appellant that is not an acceptable option. An affidavit presented to the District Court stated that many of the subpoenaed documents were needed in connection with a current audit and that their release, even for a brief period, could seriously interfere with that effort; [132] and we have no basis for an assumption that such a need for retention does not recur. To boot, appellant tells us that on previous occasions it has lent documents to the Commission that were then either lost or destroyed.[133] The Commission does not dispute the importance to an independent accounting firm of ready access to its audit work papers, nor does the Commission deny the claim that in the past it has failed to return materials borrowed from appellant. In this milieu, appellant's insistence upon retention of its originals is understandable, and hardly supports an outright denial of reimbursement for copying costs.

Nonetheless, we are unable at this time to rule affirmatively that appellant is entitled to reimbursement, for its actual future expenses conceivably could fall far short of its present projection. Its estimate will be vindicated only if the Commision designates every subpoenaed document for copying; furthermore, appellant computes duplication expense at 20 cents per page.[134] We cannot ignore the possibility that ultimately the Commission may settle for

[131] See text *supra* at notes 22-23. Compare *United States* v. *Dauphin Deposit Trust Co., supra* note 117, 385 F.2d at 131; *United States* v. *Continental Bank & Trust Co., supra* note 117, 503 F.2d at 48.

[132] J. App. 33.

[133] Brief for Appellant at 31.

[134] Brief for Appellant at 32.

a much smaller number of documents, that appellant may spend less per page than originally anticipated, or that the rate may not be entirely reasonable.[135] These are among the uncertainties in the present record cautioning against an undertaking to assess now whether or to what extent reimbursement might be in order.

There is no need to speculate in this regard. Appellant has expressed its willingness to postpone recoupment of its expenses until after full production in response to the subpoena [136]—when, of course, the propriety of reimbursement could readily be determined. More fundamentally, however, appellant's offer to defer the day of financial reckoning is a concession the Commission cannot demand of right. Judicial power to condition subpoena-enforcement upon expense-absorption, by its very nature, extends to requiring advance payment when warranted.[137] Once the agency seeking enforcement has identified the documents it wishes, the court, upon suitable demonstration of what the cost of production will likely be, may direct prepayment in such amount as the situation reasonably calls for.[138] This is but to say that the court may exercise

---

[135] The 20-cent per-page estimate is not supported either as to amount or reasonableness by any evidence in the record.

[136] Reply Brief for Appellant at 14.

[137] Should any analogy be desired, it is to be found in the subpoena for document-production in civil litigation, a situation wherein production may be conditioned upon advancement of the reasonable cost thereof. See note 123 *supra*.

[138] The parties should first endeavor to reach an understanding on the matter. If they are unable to agree, the court's authority to order advance payment can be invoked. Procedurally, the court would ascertain (a) as a matter of reasonable probability, whether agency-sharing of the expense is appropriate, text *supra* at notes 116-124, and if so, (b) the extent to which it should share, text *supra* at notes 125-128, and (c) when it should share—prepayment, reimbursement or

its discretion in favor of payment either before or after the fact. And it is hardly necessary to point out that need for a substantial outlay to enable compliance is a circumstance arguing powerfully for prepayment in some measure at least.[139]

We modify the District Court's enforcement order, then, to afford appellant the opportunity to show that the actual aggregate expense of compliance with the Commission's subpoena will be unreasonable and to seek prepayment or reimbursement accordingly.[140] For reasons earlier discussed,[141] we affirm the judgment as thus modified.

So ordered.

---

a combination of both. Prepayment will necessitate judgments based on reasonable probability, and can be directed in stages on periodic application. The theme of cost-sharing orders should be flexibility, circumscribed only by the bounds of sound judicial discretion.

[139] And it will be recalled that appellant has already produced some of the subpoenaed materials. See text *supra* at note 7 and notes 7, 24 *supra*.

[140] Relevance of the sought-after data appearing, Part III *supra*, appellant will have the burden of demonstrating excessive cost of compliance. *United States* v. *Davey*, *supra* note 118, 543 F.2d at 1000.

[141] In Parts II, III.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1716

September Term, 1978
D.C. Misc. No. 76-0098

SECURITIES AND EXCHANGE COMMISSION

v.

ARTHUR YOUNG & COMPANY,
Appellant

Before BAZELON, LEVENTHAL and ROBINSON, *Circuit Judges.*

ORDER

It is ORDERED by the Court, *sua sponte*, that the opinion filed herein on July 24, 1978, be and hereby is amended by substitution, in lieu of the last two paragraphs of text and accompanying footnotes on pages 32-33, of the following:

> There is no need to speculate in this regard. Appellant has expressed its willingness to postpone recoupment of its expenses until after full production in response to this opinion[136]—when of course, the problems of reimbursement could readily be determined. More fundamentally, however, appellant's offer to defer the day of financial reckoning to that point is a concession the Commission cannot demand of right. Judicial power to condition subpoena-enforcement upon expense-absorption, by its very nature, extends to requiring step-by-step reimbursement concurrently with document-production at any stage that the producing party has already been put to substantially more than his fair share of the costs of obedience.[137] The enforcing court has ample discretion to make certain that one possessing subpoenaed material will not for any inordinate period be out-of-pocket more than a reasonable amount.[138]
>
> We modify the District Court's enforcement order, then, to afford apellant the opportunity to show that the actual expense of compliance with the Commission's subpoena has at any given time become unreasonable and to seek reimbursement accordingly.[139] For reasons earlier discussed,[140] we affirm the judgment as thus modified.
>
> *So ordered.*

---

[136] Reply Brief for Appellant at 14.

[137] Cf. Fed.R.Civ.P. 45(b), quoted in note 123 supra. We need not decide whether judicial enforcement of administrative subpoenas may be conditioned upon advance payment of compliance costs. 31 U.S.C. § 529 (1976) provides in relevant part that "[n]o advance of public money shall be made in any case unless authorized by the appropriation concerned or other law." See *Alcoa Steamship Co., Inc. v. United States*, 338 U.S. 421, 425 & n.6, 70 S.Ct. 190, 192 & n.6, 94 L.Ed. 225, 230 & n.6 (1949). See also *Warren v. United States*, 340 U.S. 523, 526, 71 S.Ct. 432, 434, 95 L.Ed. 503, 508 (1951) ("[t]he term law in our jurisprudence usually includes rules of court decisions as well as legislative acts.").

[138] The parties should first endeavor to reach an understanding on the matter. If they are unable to agree, the court's authority to condition enforcement upon expense-sharing can be invoked. Procedurally, the court would ascertain (a) whether agency-sharing of the expense is appropriate, text *supra* at notes 116-124, and if so (b) the extent to which it should share, text *supra* at notes 125-128, and (c) when it should share. The theme of cost-sharing orders should be flexibility.

[139] Relevance of the sought-after data appearing, Part III supra, appellant will have the burden of demonstrating excessive cost of compliance. *United States v. Davey, supra* note 118, 543 F.2d at 1000.

[140] In Parts II, III.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

October 21, 1975

In the Matter of SCA Services, Inc.

File No. HO-867

Order Directing Examination and Private Investigation and Designating Officers to Take Testimony

I

The Commission's public files disclose that SCA Services, Inc. (SCA), a Delaware Corporation with executive offices in Massachusetts, has since 1970 filed as registrant a number of registration statements on Form S-1 pursuant to the Securities Act of 1933, as amended (Securities Act). These registration statements were filed in order to register shares of common stock of SCA to be issued for various purposes including issuance from time to time in connection with acquisitions of businesses by SCA, and to register shares being offered by certain selling stockholders.

The Commission's public files further indicate that SCA has common stock registered pursuant to Section 12(b) of the Securities Exchange Act of 1934, as amended (Exchange Act), and has filed annual reports, and other periodic and current reports and disseminated proxy material since at least 1970 as required pursuant to the Exchange Act.

II

Members of the staff have reported information to the Commission which tends to show that:

A. The aforementioned registration statements, prospectuses included therein, and Exchange Act filings in-

clude untrue statements of material facts or omit to state material facts required to be stated therein and necessary to make the statements therein not misleading concerning among other things:

1. Interest of management and others in certain transactions.
2. Financial statements.
3. Description of business and property.
4. Acquisition or disposition of assets.

B. SCA, its officers, directors and employees have violated or are about to violate Sections 17(a) of the Securities Act and Sections 13(a), and 10(b) of the Exchange Act and Rules 13a-1 and 10b-5 promulgated thereunder in the dissemination and filing of the above mentioned materials and in connection with the purchase and sale of the securities of SCA. While engaged in the activities described above, SCA, its officers, directors and employees directly and indirectly made use of the mails and means and instrumentalities of transportation and communication in interstate commerce.

III

The Commission, having considered the staff report and deeming such acts and practices, if true, to be in possible violation of Section 17(a) of the Securities Act, and Sections 10(b) and 13(a) of the Exchange Act and the rules 10b-5 and 13a-1 thereunder, finds it necessary and appropriate and hereby

ORDERS, pursuant to the provisions of Sections 8(e) and 20(a) of the Securities Act and Section 21(a) of the Exchange Act, that a private investigation be made to determine whether the aforesaid persons or any other persons have engaged or are about to engage in any of the reported acts or practices of similar purport or object; and

IT IS FURTHER ORDERED, pursuant to the provisions of Section 19(b) of the Securities Act and Section 21(b) of the Exchange Act, that for the purposes of such investigation Irwin M. Borowski, David H. Belkin, Richard S. Kraut, Peter M. Sullivan, Norman W. Wicks, Jeffrey S. Rosen, Robert E. Grossman, Richard J. Morvillo, Ian Dingwall, Merton B. Goldman, Andrew L. Leventhal, Richard E. Brodsky, Richard Jessup, Kathleen Gallagher and Richard L. Osborne and each of them be and hereby is designated as an officer to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, require production of any books, papers, correspondence, memoranda, or other records deemed relevant or material to the inquiry and to perform all duties in connection therewith or authorized by law.

By the Commission.

/s/ GEORGE A. FITZSIMMONS
George A. Fitzsimmons
Secretary

APPENDIX C

Attachment to Subpoena Duces Tecum

1. All documents including but not limited to (1) audit programs; (2) internal control evaluation; (3) schedules prepared by personnel of Arthur Young & Company and/or SCA Services, Inc., subsidiaries or affiliates; (4) documents received by Arthur Young & Company in the course of the audit; (5) memoranda relative to the audit, audit conclusions, technical matters, policy, accounting theory, or auditing problems; (6) review notes or point sheets; (7) interoffice correspondence and/or memoranda relating to topics mentioned in (5) above; (8) permanent files; (9) correspondence to and from SCA Services, Inc., its officers, directors, shareholders, employees or other persons related directly or indirectly with SCA Services, Inc., subsidiaries and affiliates; (10) separate financial statements in your possession of SCA Services, Inc., subsidiaries and affiliates; (11) engagement letters; (12) all billings and time records; (13) papers, documents and other matters used in the preparation of tax returns filed with federal authorities relating to taxes payable on income; and (14) other documents in your possession or under your control relating to the examination of the financial statements of SCA Services, Inc., subsidiaries and affiliates for the years ended March 31, 1970, 1971, 1972, 1973, 1974 and 1975.

2. Same as 1, above, but for any special engagements projects or management consulting services.

3. Same as 1, above, but for Carlton Hotel Corporation, subsidiaries and affiliates.

4. Same as 1, above, but for the following persons, if applicable:

a. Christopher P. Recklitis

b. Nicholas Liakas

c. Berton Steir

d. Willmac Realty Trust

e. Cyrano Corporation

f. Topkins, Gaffin, Siegal & Krattemaeker

g. H. & J. Siegel

h. Bay State Federal Savings & Loan Association

i. WTT Corporation

j. Charles H. Chaplin Trust

k. M. DeMatteo Construction Company, Inc.

l. Land Trust

m. J. C. Development Corporation

n. Lad Landfill, Inc.

o. Citibank (Central) N.A.

p. American Management Enterprises, Inc.

q. William Sherman

r. William A. Wood, Jr.

s. Maurice A. Chouinard

t. Arthur N. Trembley

u. H. Chester Webster

v. Charles E. Burns

w. Milton Yakus

x. Rocco Salerno

y. Anthony Dentro

z. William Ribyat, Jr.

aa. Anthony Guerriero

bb. Rose Gueniero

cc. All officers, directors and employees (present and past)

As used hereinabove, the terms "documents" means all writings, audio and audio recordings, discs and other devices used for storing data in a computer facility, and all other kinds of records, including but not limited to: the original or identical copy thereof and all non-identical copies (whether different from originals by reason of notation made on such copies or otherwise); all letters, telegrams, memoranda, reports, studies, checks and bank statements, workpapers, calendar or diary entries, telephone messages and log books, and notes, minutes and records of conversations, discussions, meetings and conferences; and all drafts and preliminary drafts of the foregoing.[1]

---

[1] This is designed to permit each enumerated item of attachment to define subjects or categories of documents without having to specify all the forms in which they might be found. Obviously if you know the proper name of particular documents that exist or might exist (e.g., minutes of meetings of the Board, cash journal), it will do no harm to spell it out by stating: "Meetings of the Board of Directors, including but not limited to minutes of formal board meetings".

Supreme Court, U.S.
FILED
DEC 12 1978

No. 78-677

In the Supreme Court of the United States

OCTOBER TERM, 1978

ARTHUR YOUNG & COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

RALPH C. FERRARA
General Counsel

JACOB H. STILLMAN
Associate General Counsel

JOHN M. MAHONEY
Assistant General Counsel

JUDY L. CHESSER
Attorney
Securities and Exchange Commission
Washington, D.C. 20549

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	12

CITATIONS

Cases:

Adams v. *FTC*, 296 F.2d 861, cert. denied, 369 U.S. 864	11
Baldridge v. *United States*, 406 F.2d 526	7
Barney v. *United States*, 568 F.2d 116	7
CAB v. *United Airlines, Inc.*, 542 F.2d 394	11
Cudahy Packing Co. v. *Holland*, 315 U.S. 357	10
Donaldson v. *United States*, 400 U.S. 517	7
Grathwohl v. *United States*, 401 F.2d 166	7
Kurshan v. *Riley*, 484 F.2d 952	7
McGarry v. *SEC*, 147 F.2d 389	11
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186	9
Penfield Co. of Cal. v. *SEC*, 143 F.2d 746, cert. denied, 323 U.S. 768	10
SEC v. *Brigadoon Scotch Distributing Co.*, 480 F.2d at 1047, cert. denied, 415 U.S. 915	9
SEC v. *Howatt*, 525 F.2d 226	9
SEC v. *Savage*, 513 F.2d 188	9
United States v. *Carpenter*, 425 F.2d 264	7

Cases—Continued — Page

United States v. *Lyons*, 442 F.2d 1144 7
United States v. *Morton Salt Co.*, 338 U.S. 632 9
United States v. *Powell*, 379 U.S. 48 9
Woolley v. *United States*, 97 F.2d 258, cert. denied, 305 U.S. 614 10

Statutes:

Securities Act of 1933, Section 19(b), 15 U.S.C. 77s(b) 2, 10
Securities and Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
Section 21(a), 15 U.S.C. 78u(a) 2
Section 21(b), 15 U.S.C. 78u(b) 2, 10

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-677

ARTHUR YOUNG & COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is not yet reported. The opinion of the district court (A. 100-103)[1] is unreported.

[1] "A." refers to the joint appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1978.[2] The petition for a writ of certiorari was filed on October 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Securities and Exchange Commission, after obtaining information that the financial statements of a publicly-held company contain material misrepresentations and omissions regarding substantial misuse of the company's assets, may subpoena documents relevant to the accuracy of those financial statements and the adequacy of the audits performed on them.

STATUTES INVOLVED

Section 19(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), is reproduced at Pet. 3. Sections 21(a) and (b) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a) and (b), provide, in part:

> (a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder * * * and may require or permit any person to file with it a statement in writing, under oath or

[2] On September 14, 1978, the court of appeals modified its opinion in certain respects not relevant to the issues raised in the petition. See Pet. App. 34a-35a.

> otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.
>
> (b) For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

STATEMENT

Following a staff report on the results of a preliminary investigation, the Commission ordered a formal investigation to determine whether SCA Services, Inc. ("SCA") and others violated the antifraud provisions of the federal securities laws (Pet. App. 1b-3b). The Commission had received information from its staff indicating that certain SCA registration

statements, prospectuses, proxy statements and periodic reports contained material omissions and misrepresentations. The Commission's investigation concerned SCA's disclosures relating to the interest of SCA's management and other persons in SCA's financial transactions, SCA's descriptions of its business and property, and SCA's acquisition and disposition of assets. It also concerned the integrity of SCA's financial statements (Pet. App. 2b). The Commission's order designated certain staff members to conduct the investigation and authorized them to subpoena documents relevant to the inquiry (Pet. App. 3b).

One of the designated staff members issued a subpoena duces tecum to petitioner, SCA's independent auditor. The subpoena, which set forth 14 categories of requested materials, called for the production of audit work papers and related documents pertaining to petitioner's audits of SCA's financial statements, as well as materials pertaining to special engagements and management consulting services performed by petitioner for SCA. In addition, the subpoena requested similar materials, to the extent they existed, regarding SCA affiliates and subsidiaries and certain designated persons believed to be related to SCA and its associates (Pet. App. 1c-3c; A. 57-61).

Petitioner refused to comply with the subpoena, and the Commission sought enforcement in the district court. The Commission advised the district court that although its staff's inquiry originally focused on disclosures relating to possible management self-dealing and looting, the inquiry had broadened to

include the integrity of SCA's financial statements and the adequacy of petitioner's audits of those statements (A. 16-20, 45-46). The Commission filed an affidavit of a staff accountant explaining that it was "necessary to this investigation into the integrity of the financial statements of SCA and other aspects of its filings with the Commission for the Commission staff to make a comprehensive review of audit workpapers * * *" (A. 18).[3]

The district court found that the Commission's investigation was authorized by law and that the documents sought in the subpoena were relevant to the investigation (A. 100-101). In order to ease the burden of compliance with the subpoena, however, the district court directed the Commission to examine the requested documents at the offices where they were kept, and to bear the expense of copying all documents except those that petitioner would not relinquish for copying (A. 102-103).

The court of appeals affirmed, pointing out that Congress vested the Commission with broad investi-

---

[3] The accountant's affidavit stated further (A. 18):

> Documents that [petitioner] has relating to SCA * * * are * * * necessary to determine the adequacy of SCA's disclosure of interests of management in certain transactions * * *. Such transactions may also be disguised and treated in financial statements as bona fide transactions occurring in the ordinary course of business. The subpoenaed materials are necessary to obtain evidence and leads as to possible violations by SCA's management, determine whether the audit procedures followed by [petitioner] were adequate, and whether accounting principles were properly applied.

gative powers, including the power to subpoena relevant documents (Pet. App. 8a). The court found that the Commission's order identified the subject of inquiry with reasonable specificity, and that the subpoena fell within the bounds of that order:

> By our assessment, * * * the particulars of the Commission's investigative order, when coupled with the affidavit's disclosure that the investigation extends to the adequacy of [petitioner's] audits, sufficiently specifies the scope of the investigation and reveals that it is at least as broad as the subpoena's call for documents.

Pet. App. 12a n.48. The court further noted that the areas of inquiry delineated in the Commission's order "are all areas of legitimate concern to the Commission in the discharge of its statutory responsibilities, and categories of data generally required to be submitted to the Commission and disclosed to the investing public" (Pet. App. 11a). The court of appeals also affirmed the district court's finding that the information requested in the subpoena is relevant, noting that the "Commission has established prima facie its potential importance in terms of its investigative objectives" (Pet. App. 21a). Finally, the court rejected the contention that the Commission itself must specify the documents needed to complete the investigation, pointing out that such authority is properly delegated to its staff (Pet. App. 12a-17a).

Sensitive to the expense that could be occasioned by compliance with the subpoena, the court of appeals

modified the district court's order to provide an opportunity for petitioner to show "that the actual expense of compliance with the Commission's subpoena has at any given time become unreasonable and to seek reimbursement accordingly" (Pet. App. 35a; see also *id.* at 26a-32a).

Petitioner complied with the subpoena while the case was pending before the court of appeals.

ARGUMENT

1. Petitioner has complied with the subpoena that it seeks to challenge. In such circumstances controversies about the validity of subpoenas are moot. See, *e.g.*, *Barney* v. *United States*, 568 F.2d 116, 117 (8th Cir. 1978); *Kurshan* v. *Riley*, 484 F.2d 952, 953 (4th Cir. 1973); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971); *United States* v. *Carpenter*, 425 F.2d 264, 265 (5th Cir. 1970); *Baldridge* v. *United States*, 406 F.2d 526, 527 (5th Cir. 1969); *Grathwohl* v. *United States*, 401 F.2d 166, 167 (5th Cir. 1968).[4]

---

[4] If, in the future, petitioner deems it necessary to contest the use of any materials that it has produced, it may do so at that time. See *United States* v. *Lyons*, *supra*, 442 F.2d at 1145-1146, quoting *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971): "[i]f and when a future * * * proceeding is initiated * * * 'to the extent that [petitioner] has * * * a protectable interest, as, for example, by way of privilege, or to the extent he may claim [an] abuse of process, [petitioner] may always assert that interest or that claim in due course at its proper place in any subsequent trial.' "

2. In any event, petitioner's arguments are insubstantial. We principally rely on the thorough opinion of the court of appeals, which points out that the subpoena calls only for documents that are relevant to a legitimate Commission investigation. Petitioner repeatedly contends that the subject matter actually under investigation is narrower than the subpoena in question, arguing that the investigation is limited to questions of "looting and self-dealing" (Pet. 20, 23, 10, 11, 17). But petitioner ignores the fact that the Commission's order expressly requires an investigation of SCA's financial statements (Pet. App. 2b) and that the affidavit of the Commission's staff accountant stated that the investigation encompasses an inquiry into "the integrity of * * * [SCA's] financial statements," the adequacy of petitioner's "audit procedures," and the "accounting principles" that were applied (A. 18).

3. Petitioner argues that if the investigation includes SCA's financial statements and petitioner's audits, in addition to disclosures with respect to looting and self-dealing, then the investigative order and subpoena are defective because the Commission lacks authority to conduct such a broad investigation (Pet. 17). But, as the court of appeals explained, this case involves serious questions of the integrity of financial statements included in registration statements, prospectuses, proxy statements and periodic reports filed with the Commission and disseminated to the investing public:

> The investigation focuses on the financial statements and activities of SCA, a publicly-held corporation, and during the period under scrutiny [petitioner] has been the principal independent accountant for that corporation, examining and certifying what the Commission believes to be inaccurate financial statements. The adequacy of the examinations leading to those certifications thus plainly emerges as a logical and permissible subject of inquiry.

Pet. App. 12a. This Court repeatedly has affirmed the breadth of the investigatory powers of federal administrative agencies. See, *e.g.*, *United States* v. *Powell*, 379 U.S. 48, 53-54 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643, 652 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 216 (1946).[5] These decisions confirm the validity of the Commission's subpoena here.

Moreover, this is not a case where an administrative agency is conducting an investigation merely out of "curiosity" or to obtain assurance that the law has not been violated (*United States* v. *Morton Salt Co.*, *supra*). The Commission had information indicating inaccurate disclosures regarding "diversion or other misuse of SCA's assets" (A. 17; Pet. App. 10a). In light of the "preliminary indication of falsifications or misleading omissions in registration statements, proxy materials and periodic reports * * *" (Pet.

---

[5] See also *SEC* v. *Howatt*, 525 F.2d 226, 229 (1st Cir. 1975); *SEC* v. *Savage*, 513 F.2d 188, 189 (7th Cir. 1975); *SEC* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1052-1053 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974).

App. 10a; footnote omitted), it was proper for the Commission to inquire further into SCA's financial statements and audits during the years in question. It was necessary to examine all of the company's financial statements to determine whether episodes of self-dealing were disguised as bona fide business transactions (A. 18). Because of the indication of numerous occurrences of inaccurate reporting, it was appropriate to inquire into SCA's system of financial disclosure as well as the adequacy of petitioner's performance of its audits (Pet. App. 12a, 25a).[6]

4. Petitioner further contends that the decision of the court of appeals upholds an excessively broad subpoena, and that the Commission may now reach "all of the documents in [petitioner's] possession" (Pet. 3, 14). But the subpoena called only for documents relating to SCA and various persons associated with SCA. The materials requested "comprise but one coherent set of work papers and ancillary materials routinely generated and assembled in any

[6] Petitioner also argues that the Commission could not properly delegate to its staff the issuance of a subpoena to obtain relevant documents. But Section 19(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), and Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(b), both provide for such delegation. This Court has recognized that these provisions permit the Commission to delegate its subpoena power. See *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, 365 n.9 (1942). See also *Woolley* v. *United States*, 97 F.2d 258, 262 (9th Cir.), cert. denied, 305 U.S. 614 (1938), and *Penfield Co. of Cal.* v. *SEC*, 143 F.2d 746, 749-750 (9th Cir.), cert. denied, 323 U.S. 768 (1944), rejecting the contention that the Commission must itself determine what materials are to be subpoenaed.

audit" (Pet. App. 20a). Although the subpoena encompassed many documents, that was a necessary consequence of the complex nature of the Commission's investigation, which involved SCA's financial disclosures as well as petitioner's audits and certifications of SCA's financial statements.

The quantity of material to be produced is not the measure of whether a subpoena is overbroad. The validity of the subpoena is tested by the relevance of the requested material to the subject matter of the investigation. *Adams* v. *FTC*, 296 F.2d 861, 867 (8th Cir. 1961), cert. denied, 369 U.S. 864 (1962); *McGarry* v. *SEC*, 147 F.2d 389, 392 (10th Cir. 1945). Both of the courts below concluded that the materials requested are relevant to the Commission's investigation (Pet. App. 25a; A. 101). There is no reason for this Court to review that factual determination, concurred in by two lower courts.

Moreover, petitioner's arguments about the burdensome nature of the subpoena ignore the protective orders entered by the district court and court of appeals. Those orders required the Commission to examine petitioner's documents at the offices where they were stored and required the Commission to pay for much of the expense of duplication. Petitioner also may apply for cost reimbursement, to the extent that it is appropriate, under the order of the court of appeals (Pet. App. 27a-35a).

5. Finally, petitioner is in error in asserting (Pet. 21-24) that the decision below conflicts with *CAB* v. *United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976).

The *United Airlines* case does not involve the issue presented here. In that case the Civil Aeronautics Board argued that it had unlimited visitorial powers and that it was not required either to specify an investigative purpose or to have such a purpose in demanding information. The Seventh Circuit held that nothing in the Federal Aviation Act or its legislative history supported the Board's claim of plenary inspection powers. 542 F.2d at 401. The Commission's order here, in contrast, specifically identifies its investigative purpose, including inquiry into SCA's financial statements, and both courts below held that the subpoenaed documents are relevant to this legitimate investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submited.

WADE H. MCCREE, JR.
Solicitor General

RALPH C. FERRARA
General Counsel

JACOB H. STILLMAN
Associate General Counsel

JOHN M. MAHONEY
Assistant General Counsel

JUDY L. CHESSER
Attorney
Securities and Exchange Commission

DECEMBER 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 279636 230

DEC 19 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-677

ARTHUR YOUNG & COMPANY, *Petitioner*,

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*.

REPLY BRIEF OF PETITIONER ARTHUR YOUNG & COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carl D. Liggio
John E. Matson

ARTHUR YOUNG & COMPANY
277 Park Avenue
New York, New York 10017
212-922-2465

Milton V. Freeman
Stephen M. Sacks

ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D. C. 20036
202-872-6681

Attorneys for Petitioner
Arthur Young & Company

December 18, 1978

TABLE OF CONTENTS

		Page
I.	THE CASE IS NOT MOOT	2
II.	THE COMMISSION'S ASSERTION THAT ALL OF A PRIVATE PARTY'S DOCUMENTS MAY APPROPRIATELY BE EXAMINED BECAUSE AN INVESTIGATION WAS BROAD RENDERS CONSTITUTIONAL PROTECTIONS AND JUDICIAL REVIEW MEANINGLESS	3
III.	THE DECISION IN ISSUE HERE SQUARELY CONFLICTS WITH THE DECISION OF THE SEVENTH CIRCUIT CITED IN THE PETITION	5
IV.	CONCLUSION	6

REPLY BRIEF OF PETITIONER ARTHUR YOUNG & COMPANY

The brief submitted on behalf of the Securities and Exchange Commission ("the Commission") in opposition to the petition for *certiorari* vividly demonstrates the vice which Arthur Young & Company ("Arthur Young") is attacking in this proceeding and offers an additional reason why review by this Court is essential.

According to the Commission's theory, as adopted by the Court of Appeals, an administrative agency has only to specify broad, vague topics of investigation for its staff to have unbridled discretion to compel a private party to produce any piece of paper in its possession. Commission Brief at 11. Ironically, under this approach the broader and more vague the agency description of the investigation, the broader the latitude of the staff in demanding documents without effective scrutiny by either the agency or the courts.

We respectfully submit that this approach renders virtually meaningless the Constitutional rights to privacy and to be free from unreasonable searches; and it converts the courts into rubber stamps for agency staffs and makes the courts participants in a violation of law. In recent months, this Court has condemned warrantless searches by administrative agencies on just these grounds.

> The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search.

Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483, 4487 (U.S. May 23, 1978).

The situation facing the Court in the instant case is no different. The issue is not, as the Commission poses it (Commission Brief at 2), whether an agency may seek information which is relevant and material to its investigation,[1] but what standard determines whether the information is, in fact, relevant and material on other than an agency staff's *ipse dixit*. The Court of Appeals has permitted the Commission to give its staff the same "unbridled discretion" to conduct, in effect, a warrantless search of Arthur Young's files. As demonstrated in our petition, this not only does violence to the plain requirements of the securities laws, but also it breaches fundamental principles of constitutional and administrative law. We believe it important that this Court review this type of conduct now.

I. THE CASE IS NOT MOOT

In its brief, the Commission contends that this case is moot because Arthur Young complied with the subpoena while the case was pending before the Court of Appeals. Commission Brief at 7. This is not so.

First, the District Court order required Arthur Young to produce documents for examination in each of the fifteen cities where the documents were located. The Commission staff has not as yet examined Arthur Young's documents in the majority of these cities, nor has it ever advised Arthur Young either that it does not intend to do so or that the investigation has been concluded. Accordingly, production of documents by Arthur Young pursuant to the subpoena is presumably not complete.

[1] Arthur Young never contested the right of the Commission staff to seek relevant and material information. In fact, the record is clear that Arthur Young complied, at substantial expense, with the Commission staff requests for documents and that it was only when the staff's demand for documents changed from the specific to the all-encompassing that Arthur Young resisted.

Second, in oral argument before the Court of Appeals, Commission counsel confirmed that production of documents was incomplete. There have been no subsequent requests by the staff for additional production.

Third, in any event, the order of the Court of Appeals permits Arthur Young to seek reimbursement of the unreasonable expenses incurred by it in compliance with the subpoena. A determination by this Court that the subpoena was unlawfully broad would render unreasonable much of the expense incurred by Arthur Young in producing documents, which, in turn, would increase Arthur Young's right to reimbursement.

For any of these reasons, the case is not moot.

II. THE COMMISSION'S ASSERTION THAT ALL OF A PRIVATE PARTY'S DOCUMENTS MAY APPROPRIATELY BE EXAMINED BECAUSE AN INVESTIGATION WAS BROAD RENDERS CONSTITUTIONAL PROTECTIONS AND JUDICIAL REVIEW MEANINGLESS

According to the Commission, all that a court need do in considering whether to enforce a subpoena is compare the relevance of the requested materials "to the subject matter of the investigation." Commission Brief at 11. The Commission argues that it was engaged in a broad investigation of SCA Services, Inc. ("SCA"), including its "financial statements" and thus, a subpoena for *all* of Arthur Young's documents pertaining to SCA and to anyone who might have had anything to do with SCA could not have been overly broad.

If a court is bound by an agency's broad, vague definition of the scope of an investigation and must, in a

subpoena enforcement proceeding, do no more than compare the relevance of requested documents to the agency's definition of the investigation, judicial review of agency subpoenas is meaningless. Where, as here, an agency abdicates its statutory responsibility and gives its staff the broadest possible discretion by defining the scope of the investigation to encompass virtually every aspect of a company's business, that rule would effectively deprive a subpoenaed party of any means of testing the subpoena.

Denial of this petition will encourage the Commission and its staff to continue this type of egregious conduct which is, unfortunately, not limited to this case. Accounting firms like Arthur Young, and other entities, are all too frequently faced with broad subpoenas like that issued in this case. As one of the Commission's staff accountants candidly admitted during the California CPA Foundation on the SEC Update Program on November 15-16, 1978:

> The [Commission's] Division of Enforcement generally when it issues a subpoena for documents will in fact ask for more documents than it really needs. This is particularly true for accounting firms.

The Court of Appeals' decision permits this type of behavior to continue with the assistance of a court; it destroys the statutory scheme for judicial review of administrative agency subpoenas; and it renders meaningless the right to privacy and the freedom from unreasonable searches that every person has under the Fourth Amendment.

It is not enough to answer, as the Commission does (at 11), that the Court of Appeals solved this problem by ordering the Commission to reimburse Arthur Young for the unreasonable expense of complying with the subpoena.

Congress intended that a meaningful lawsuit would exist if a dispute arose over compliance with an administrative subpoena and that a court would decide the appropriate scope of the subpoena in light of constitutional and statutory consideration. What the court has done below is make two law suits out of one: the first, when the subpoena is enforced, and the second, when reimbursement is considered. Contrary to the approach taken by the Court below, the issue now before this Court is whether a Government agency may use compulsory process and secure otherwise private documents, not whether Arthur Young should be paid for this intrusion.

III. THE DECISION IN ISSUE HERE SQUARELY CONFLICTS WITH THE DECISION OF THE SEVENTH CIRCUIT CITED IN THE PETITION

The Commission contends that there is no conflict between the decision below and *CAB v. United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976), but its only real basis is that the *United* case involved the CAB, while this case involves the SEC. Commission Brief at 12. The uncontroverted fact is that both cases involve precisely the same type of agency conduct. By specifying a broad, vague topic of investigation which intrudes into virtually every aspect of a corporation's business, the SEC is acting no differently here than the CAB acted in *United*. Yet, as the Seventh Circuit held, the CAB's conduct was improper because that agency failed, first, to state specifically the purpose of its investigation and, then, to frame requests for documents relevant to that specific purpose. The decision below would obviate the specificity inherent in the Fourth Amendment and required by the Seventh Circuit.

Accordingly, there is a most direct conflict between the decision of the Seventh Circuit in *United* and the D.C. Circuit in this case. It is important for this Court to resolve that conflict now.

IV. CONCLUSION

For the reasons set forth in our petition and in this brief, we respectfully submit that the petition for *certiorari* should be granted.

Dated: December 18, 1978

Respectfully Submitted,

Carl D. Liggio
John E. Matson

ARTHUR YOUNG & COMPANY
277 Park Avenue
New York, New York 10017
212-922-2465

Milton V. Freeman
Stephen M. Sacks

ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036
202-872-6681

Attorneys for Petitioner
Arthur Young & Company